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PRODUCT LIABILITY: EXTENT OF 'LITIGATION EXPLOSION' IN
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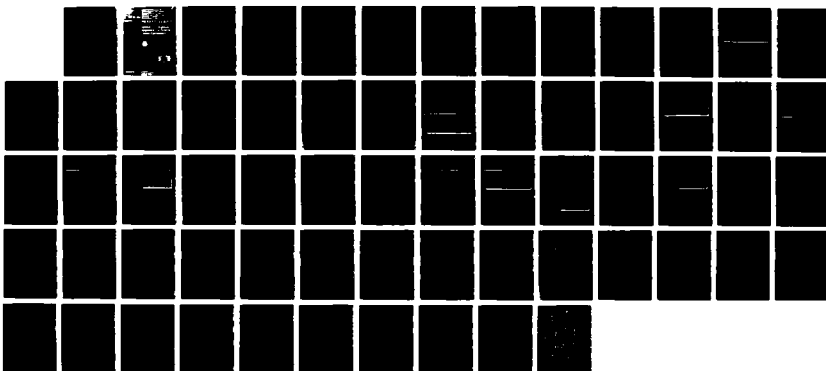
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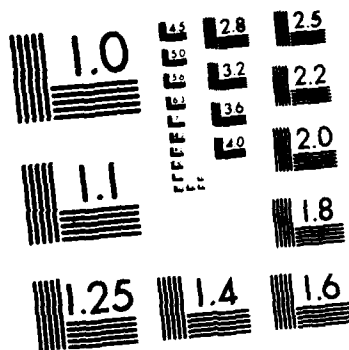
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Briefing Report to the Chairman,
Subcommittee on Commerce, Consumer
Protection and Competitiveness,
Committee on Energy and Commerce,
House of Representatives

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PRODUCT LIABILITY

AD-A191 932

Extent of "Litigation Explosion" in Federal Courts Questioned



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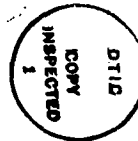
Human Resources Division

B-229423

January 28, 1988

The Honorable James J. Florio
Chairman, Subcommittee on Commerce,
Consumer Protection and Competitiveness
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:



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This briefing report is in response to your request for an analysis of product liability cases filed in federal courts (in this report, the U.S. District Courts) between 1974 and 1986. The February 1986 report of the Tort Policy Working Group, a federal interagency task force headed by the Department of Justice, indicated that between 1974 and 1985, there was a 758 percent increase in the number of product liability filings in federal courts.

This dramatic growth has been interpreted differently by various groups: Insurance companies and buyers contend that it is indicative of a "litigation explosion"—an excessively litigious society that is suing at an ever-increasing rate. This growth, along with the increasing size of awards and expansions in other areas of the tort system, is cited as (1) a primary reason for the sharp rise in the mid-1980's in insurance premiums for product liability and (2) evidence of the need for tort reform.

Consumer groups, trial lawyers' associations, state government organizations, and some legal scholars, on the other hand, have argued that the growth in these filings is not indicative of a litigation explosion. These groups claim that the growth in filings in federal courts is limited to a small number of products and does not reflect what is happening in state courts. Although data on product liability cases filed in state courts are generally unavailable, for all tort filings (of which product liability is a subset), about 95 percent of the cases are filed in state courts. Thus, these groups argue, tort cases filed in federal courts are a small portion of all filings and should not be considered indicative of general trends. There is also concern that the growth in federal court filings may have been overstated because cases transferred between federal courts were counted as a filing more than once in the data reported by the Working Group.

To examine the nature and extent of the growth in product liability filings in federal courts since 1974, we collected data from five main

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sources: the Administrative Office of the U.S. Courts; the Federal Judicial Center; the Asbestos Claims Facility (also called the Wellington Facility); A.H. Robins Company, Inc., the manufacturer of the Dalkon Shield, an intrauterine birth control device; and Merrell Dow Pharmaceuticals Inc., the manufacturer of bendectin, a morning-sickness drug. We also gathered information on product liability cases filed in state courts for three states—Connecticut, Iowa, and Massachusetts; for all states, we collected data on filings related to four products—the Dalkon Shield, bendectin, asbestos, and metal-cutting and metal-forming equipment. We obtained these data from previously conducted studies, manufacturers, and centralized data bases maintained in two states. We generally did not verify the data by reviewing their original sources.

Summary Observations

Our analysis indicates that asbestos-related cases account for a significant percentage of the growth in product liability filings in federal courts. The growth in filings unrelated to the Dalkon Shield, bendectin, and asbestos does not appear to have been rapidly accelerating or explosive. These are our specific findings:

- From 1974 through 1985 (the time period examined by the Working Group), asbestos cases account for 40 percent of the total growth in federal product liability filings, the Dalkon Shield for 12 percent, and bendectin for 5 percent. In that time period, filings unrelated to these three products grew 302 percent; total filings grew 721 percent (excluding duplicates).
- When the time period is extended to 1986, the growth in total filings is 738 percent. Asbestos cases account for one-half of this growth from 1974 to 1986 and about three-quarters of the growth since 1981. Because of a decline from 1985 to 1986 in the number of Dalkon Shield and bendectin cases, only 3 percent of the growth through 1986 is attributable to the Dalkon Shield and less than 1 percent to bendectin. In 1974-86, filings unrelated to these three products grew 338 percent.
- Although duplicate filings of transferred cases had little effect on trends, changes in 1974 and 1975 in how product liability cases were identified are likely to have led to (1) an underestimation in the number of product liability cases in those years and (2) thus, an overstatement in growth when 1974 is used as the baseline year.
- When calculated from 1976 (the first year likely to include complete data on product liability filings), rather than 1974, the growth in federal product liability filings through 1986 is 272 percent. For cases unrelated to the Dalkon Shield, bendectin, and asbestos, the growth is 104 percent.

Since 1976, asbestos cases account for 60 percent of the growth; Dalkon Shield and bendectin combined account for about 1 percent.

- From 1976 to 1986, the largest annual growth in federal court filings unrelated to asbestos, the Dalkon Shield, and bendectin occurred between 1979 and 1981 (with increases of 18 percent in 1979, 11 percent in 1980, and 17 percent in 1981). From 1976 through 1981, these filings increased at a faster rate than (1) civil filings in general and (2) the real gross national product (GNP) for personal expenditures on durable and nondurable goods (a rough index of the number of products available to consumers). Since 1981, however, product liability filings unrelated to the three products have grown at about the same rate as civil filings in general and personal expenditures on goods.
- Our analysis of the limited data on product liability cases filed in state courts reveals good reasons for not making the assumption that state courts have experienced the same trends as the federal courts. Although state court filings match federal court filings in the direction of change within the 1974-86 period, the magnitude of year-to-year changes in the number of state and federal filings shows significant differences in all of the cases for which we could make comparisons. A trend toward filing in federal courts, rather than state courts, seems evident, although more data are needed for definitive conclusions concerning this trend. The data also indicate that federal cases may be a more significant component of product liability litigation than some have argued.

These data seem inconsistent with the contention that there is a rapidly accelerating growth in federal product liability filings across a wide range of products. In addition, these data do not shed light on the reasons for the observed growth in filings, nor do they provide a basis for determining whether society is excessively litigious. Finally, these data tell us nothing about the extent to which the stated goals of providing equitable outcomes and deterring wrongdoing are fulfilled by the current tort system or would be fulfilled by reforming the current system.

Department of Justice Comments

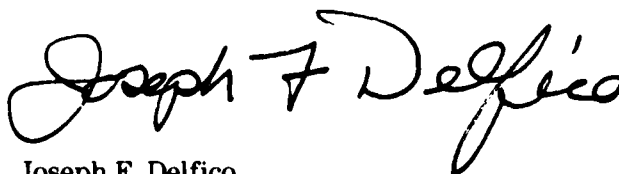
On November 16, 1987, the Department of Justice commented on a draft of this report, expressing several concerns: According to Justice, when considering general patterns of growth, it is inappropriate to exclude filings for specific products, such as asbestos; the growth in total filings is a better indicator of general trends in product liability. Although we agree that total growth is important and report these figures, we believe that assessing the components of growth provides more useful information about general trends than examining total growth alone.

Justice expressed concern about our assessment of the accuracy of data from 1974 and 1975. Many factors led us to conclude that data from this period are likely to be unreliable. Therefore, we used 1976 as a baseline year. Justice also expressed concern about the methodology used to identify duplicate filings. We have, therefore, described our methodology in more detail in the report. Finally, Justice was concerned that the data we report on filings in state courts are insufficient for evaluating the Tort Policy Working Group's assumption: The growth in product liability cases filed in state courts is of the same magnitude as that observed in federal courts. We agree that the available data reported from state courts are not sufficient to be definitive, but they do raise questions about the Working Group's assumption, for which no evidence was presented. Justice's comments and our replies to them are included as appendix II.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies to other congressional committees; the Director, Office of Management and Budget; and other interested parties.

On September 1, 1987, we briefed your staff concerning the contents of this report. Should you or your staff want additional information on these matters, please call me on 275-6193.

Sincerely yours,

A handwritten signature in black ink, reading "Joseph F. Delfico". The signature is written in a cursive, flowing style with a large initial "J".

Joseph F. Delfico
Senior Associate Director

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Abbreviations

ACF	Asbestos Claims Facility
DES	diethylstilbestrol
FJC	Federal Judicial Center
GNP	gross national product
ICJ	Institute for Civil Justice
NCSC	National Center for State Courts
NMTBA	National Machine Tool Builders Association

Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned

Introduction

The recent crisis in the availability and affordability of liability insurance has sparked debate over (1) the nature and extent of growth in product liability cases filed in federal courts (in this report, U.S. District Courts) and (2) the significance of that growth for insurers and policy-makers. In 1985, property and casualty insurance premiums increased dramatically; commercial general liability insurance, especially the product liability component, was one of the types of property and casualty insurance most affected by cost increases. There were sharp reductions in the amount of available coverage for some product areas, and premium increases were so dramatic (for example, as much as 1,000 percent or more) that some businesses could no longer afford them. Insurers justified rate increases, in part, as a response to a rapid growth in losses resulting from increases in the number of product liability suits and the size of awards given in those suits.

At the request of the Chairman, Subcommittee on Commerce, Consumer Protection and Competitiveness, House Committee on Energy and Commerce, we have examined growth in product liability cases filed in federal courts since 1974. The Chairman was especially concerned with (1) the particular types of cases that were increasing in number and (2) the pattern of growth for products other than those that have been the subject of a significant amount of litigation, such as asbestos.

Background

A February 1986 report by the Tort Policy Working Group, a federal interagency task force headed by the Department of Justice, largely (1) set the agenda for the ensuing debate concerning the causes and cures of this insurance "crisis" and (2) thrust the data on the number of product liability cases filed in federal courts into prominence in that debate.¹ In its analysis, the Working Group concluded that although factors such as declining interest rates may have lowered insurers' reserves and necessitated raising premiums, expansions in the scope of the tort system (see 1 through 4 below) were primary factors contributing to higher premiums. According to the group,

"The insurance availability/affordability crisis is one symptom—albeit the most dramatic and acute symptom—of the dislocations and problems generated by a malfunctioning tort system."²

¹Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability (Washington, D.C., Feb. 1986).

²Ibid., p. 30.

Significant problems in the tort system identified by the Working Group included (1) a movement away from considerations of intent or negligence toward "no fault" liability, (2) the undermining of liability based on who caused the injury, (3) a large growth in the size of jury awards, and (4) excessive litigation costs.

Growth in Filings

One measure cited as an indicator of these problems was a recent growth in tort suits. As shown in figure 1, the number of product liability cases filed in federal courts, reported by the Administrative Office of the U.S. Courts, increased from 1,579 in 1974 to 13,554 in 1985, a 758 percent increase. The Working Group's report stated, "There is no reason to believe that states courts have not witnessed a similar dramatic increase in the number of product liability claims."³

The Working Group characterized this growth in product liability filings, as well as growth in filings in other areas of torts,⁴ as "rapidly accelerating" and, along with the instability in liability standards, giving insurers the impression that increases would continue unabated. In fact, insurers interpreted the growth in product liability filings as an indicator of a "litigation explosion"—an excessively litigious society suing at an ever-increasing rate. Presumably, this litigiousness has been a result of expansions in liability standards and higher potential outcomes (fees and awards) for both attorneys and their clients.

Significance for Insurers

The Working Group pointed to what it saw as obvious effects on insurers of this growth in filings. The increasing tendency to sue, along with possible increases in award amounts, represented higher risks to insurers. Insurers, therefore, had to raise premiums to cover those higher risks, and availability and affordability problems followed.

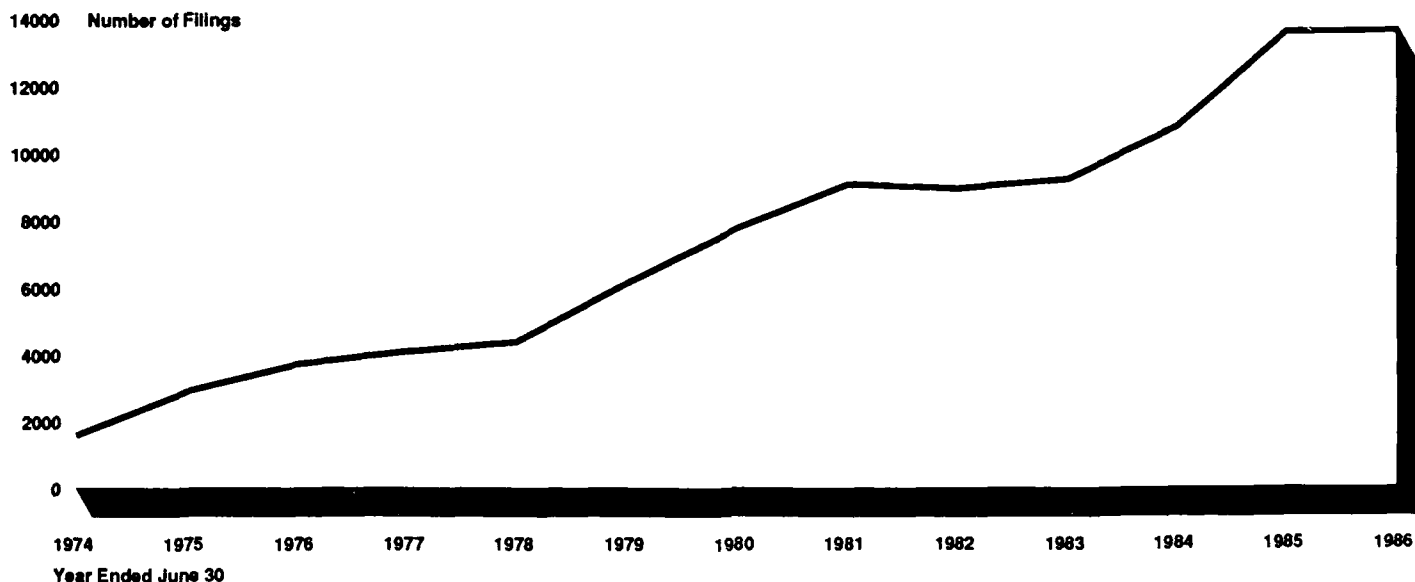
As early as 1977, articles in insurance trade publications had interpreted the growth in federal court filings as a sign of the increasing risks to insurers posed by the tort system. For example, in 1977, "Insurance Facts," a fact sheet published annually by the Insurance Information Institute, cited the 134 percent growth from 1974 to 1976 in

³Ibid., p. 45.

⁴The Working Group also reported a growth in the number of claims for medical malpractice and municipal and county officials' liability. Medical malpractice claims against physician-owned companies increased 123 percent from 1979 to 1983. According to a survey of over 1,200 local governments, claims against municipal and county officials increased 141 percent between 1979 and 1983. See Tort Policy Working Group, op. cit., pp. 46-47.

Product Liability: Extent of "Litigation
Explosion" in Federal Courts Questioned

Figure 1: Product Liability Filings in Federal Courts



Source: Administrative Office of the U.S. Courts.

product liability cases filed in federal courts as evidence of a "continuing propensity for the public to sue"; the institute called for tort reforms to alleviate "insurance-related problems of society's making."⁵ Subsequent fact sheets have updated the data on federal court filings and reported the growth as (1) resulting from problems with the tort system and (2) indicating excessive litigiousness and higher insurance risks.⁶ According to a 1980 Business Insurance article, the 26.4 percent increase from 1979 to 1980 in product liability cases filed in federal courts was seen by some as evidence of the need for tort reform and for raising insurance rates.⁷

⁵"Insurance Facts: Property, Liability, Marine, Surety" (New York, 1977), p. 8.

⁶In 1984, the title was changed from "Insurance Facts: Property, Liability, Marine, Surety" to "Insurance Facts: Property/Casualty Fact Book."

⁷J. Geisel, "Product Liability Suits Jump in '80, Court Report Says," Business Insurance (Oct. 6, 1980), pp. 3 and 31.

Debates About the "Litigation Explosion"

Consumer groups, plaintiffs' attorneys, legal scholars, and state government and court associations have challenged interpreting trends in product liability filings as a litigation explosion. First, the assumption that trends in federal courts are representative of state courts has been widely criticized.⁸ Estimates indicate that only about 5 percent of all tort cases (of which product liability is a subset) are filed in federal courts.⁹ Since such a small percentage of all tort cases are filed in federal courts, it was argued that growth in these cases is of extremely limited significance and cannot be assumed to represent trends for the majority of suits.¹⁰ A preliminary report of court activity in Illinois revealed that even activity at one level of a state court system may not be representative of activity at other levels in the same state.¹¹ A National Center for State Courts (NCSC) study seemed to indicate that cases filed in state courts had not shown the same dramatic growth as federal court filings.¹² This apparent difference led to speculation by some groups that the growth in federal court filings indicated an increasing preference for resolving disputes in federal courts and, thus, a disproportionate increase in litigation in federal courts as opposed to state courts.¹³ Weaknesses in the NCSC study, which are discussed later (see pp. 13-14), however, limit the strength of arguments based on its findings.¹⁴

Second, many critics questioned whether the growth in filings represented what was broadly happening in product liability. Specifically, these critics argued that suits involving a small number of products accounted for a significant percentage of the growth in cases filed in

⁸See, for example, D. M. Trubek et al., *The Costs of Ordinary Litigation*, 3 U.C.L.A. Law Review 4 (1983), p. 81, n. 21; Stephen Daniels, "We're Not a Litigious Society," *The Judges Journal*, Vol. 24 (1985), pp. 18-21 and 47-50; National Association of Attorneys General, "An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance" (Mass., May 1986); Public Citizen, "The Assault on Personal Injury Lawsuits: A Study of Reality Versus Myth" (Washington, D.C., Aug. 1986).

⁹Public Citizen, op. cit., p. 9; J. S. Kakalik and N. M. Pace, "Costs and Compensation Paid in Tort Litigation," Testimony before the Subcommittee on Trade, Productivity, and Economic Growth, Joint Economic Committee of the U.S. Congress, July 29, 1986.

¹⁰See, for example, Public Citizen, op. cit.; National Association of Attorneys General, op. cit., p. 24.

¹¹Daniels, op. cit., p. 47.

¹²National Center for State Courts, "A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981, and 1984" (Williamsburg, Va., Apr. 1986).

¹³See, for example, Public Citizen, op. cit., p. 10; National Association of Attorneys General, op. cit., p. 24.

¹⁴For discussion of these weaknesses, also see Daniels, op. cit.

federal courts.¹⁵ The Institute for Civil Justice (ICJ) reported that, as of April 31, 1985, an estimated 33,000 asbestos cases had been filed and were fairly evenly distributed between state courts and federal courts.¹⁶ Other products cited as involving significant litigation include A.H. Robins's Dalkon Shield (an estimated 8,700 cases by 1985),¹⁷ bendectin (an estimated 1,219 since 1980), and Zomax (an estimated 253 cases since 1982).¹⁸ In addition, diethylstilbestrol (DES), Agent Orange, Oraflex, and Ford defective transmissions are other products thought to have contributed heavily to the filings growth.^{19, 20}

Third, the accuracy of the Administrative Office's data on the number of cases filed was questioned, specifically concerning how duplicate filings of the same case may have affected growth trends.²¹ A "filing" is logged when a case is originally filed in a federal court and, again, if the case is transferred between federal courts.²² Transferred cases, therefore, are counted as a filing more than once. Some critics have speculated that as a result of such duplicate filings, the Administrative Office's data might overstate the growth in cases.

¹⁵See, for example, Public Citizen, op. cit., pp. 10-11; M. Galanter, The Day After the Litigation Explosion, 46 Maryland Law Review 1 (1986), pp. 24-26.

¹⁶D. R. Hensler et al., Asbestos in the Courts: The Challenge of Mass Toxic Torts (Santa Monica, Calif.: The Institute for Civil Justice, The Rand Corporation, 1985), p. 21.

¹⁷Galanter, op. cit., p. 25.

¹⁸Public Citizen, op. cit., p. 11.

¹⁹Ibid., pp. 35-37.

²⁰The Dalkon Shield is an intrauterine device for birth control. Users' complaints have named pelvic inflammatory disease and sterility as resulting from the device. Less frequently, birth defects and death have been reported. Bendectin is a morning-sickness drug; suits against its manufacturers have named it as a cause of birth defects. Zomax, a pain killer, has been linked to adverse reactions ranging from swelling and difficulty breathing to death. DES is a synthetic hormone used to prevent spontaneous abortion in pregnant women; the drug has been linked to uterine cancer in users' daughters, who, as of 1984, had filed about 1,000 claims against DES manufacturers. Agent Orange is a herbicidal defoliant that was used extensively in the Vietnam war to clear jungle. It contains dioxin, a known carcinogen, which Vietnam veterans claim has caused cancer and other serious health effects and birth defects in their children. By early 1985, about 200,000 veterans had claimed adverse reactions from exposure to Agent Orange. Oraflex, an arthritis medicine, is suspected of causing liver and kidney failure. By August 1982, 200 users had reported nonfatal reactions related to liver and kidney function; 26 users had died from liver or kidney problems.

²¹Public Citizen, op. cit., p. 7.

²²Cases are transferred between federal courts primarily for the convenience of the parties or for purposes of multidistrict litigation, which is the transfer to one court of similar suits that were filed in different courts. These suits are combined for pretrial proceedings and, usually, returned to the originating court for trial. Infrequently, cases are also combined for trial.

Finally, some groups and legal scholars have challenged the assumption that a growth in filings points to a litigious society and tort system problems.²³ The idea that Americans are overly litigious first appeared in the 1970's in literature concerning an increase in the number of tort filings.²⁴ Initially, this increase was seen as a challenge to the ability of the court system to meet society's legitimate needs; by 1977, however, it was interpreted as an indicator of an excessively litigious society that threatened the survival of the court system.

Some legal scholars have argued that to interpret a growth in filings simply as a symptom of excessive litigiousness is to ignore the complexity of modern society and dispute resolution. These scholars maintain that a change in filings may reflect changes in other factors, such as the incidence of injury or the relationship between litigants, which can also influence the number of suits and preferences for the way disputes are resolved.²⁵ It has been pointed out that the idea of a litigation explosion implicitly assumes that current trends were preceded by low litigation rates.²⁶ Analyses of filings in selected courts back to the 1800's, however, indicate that current trends in filings have not been preceded by uniformly low litigation rates but rather by many peaks and valleys; some peaks have exceeded the current per capita filing rate.

In summary, critics have alleged that the growth in the number of product liability cases filed in federal courts is (1) insignificant in the context of all filings, (2) confined to a small number of products, (3) possibly overstated, and (4) ambiguous in its causes and meaning. These critics argue that the data do not convincingly demonstrate the existence of a broad litigation explosion or that the number of court cases is a primary factor influencing the cost of insurance.

In a March 1987 update to its initial report, the Working Group responded to some of these criticisms.²⁷ First, the group pointed to clear

²³See, for example, M. Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. Law Review 5, pp. 4-71 (1983); Galanter, The Day After the Litigation Explosion, op. cit., p. 37; Trubek, op. cit., pp. 84-85 and 122-23.

²⁴Galanter, Reading the Landscape of Disputes, op. cit., pp. 9-10.

²⁵Galanter, The Day After the Litigation Explosion, op. cit., pp. 14-15 and 27-28; see also, Galanter, Reading the Landscape of Disputes, op. cit., pp. 13 and 24-26.

²⁶Galanter, Reading the Landscape of Disputes, op. cit., pp. 36-41.

²⁷Tort Policy Working Group, An Update on the Liability Crisis (Washington, D.C., Mar. 1987).

weaknesses in the NCSC study, which had often been used to counter the assumption that trends in federal court filings could be generalized to state courts. Specifically, the NCSC study had only collected data for a subset of state courts and for only three points in time (1978, 1981, and 1984). In addition, automobile accident suits had been included in the data; the study failed to take into account the significant decrease in these suits resulting from states enacting no-fault insurance laws, which could have offset litigation growth in other tort filings, for example, those related to product liability. Finally, the Working Group argued that since the study had considered all tort filings, it was impossible to draw any specific conclusions about trends in product liability filings or cases related to other "troubled" types of insurance.

The Working Group also responded to allegations that asbestos litigation made the data unrepresentative of trends across a wide range of products. Relatively few suits in 1974 would have been asbestos-related because only a small number of asbestos cases were filed before the mid-1970's. The filings rate increased dramatically after 1978, with 4,239 asbestos cases reported by the Administrative Office for its reporting year ending June 30, 1985. Compared with the total of 1,579 product liability suits filed in 1974, few of which were related to asbestos, the approximately 9,000 nonasbestos cases filed in 1985 still constituted a 500 percent increase. The Working Group concluded that although lower than the original estimate of 758 percent, this increase still appeared to be significant and far exceeded the 164 percent increase since 1974 for civil filings in general.

In addition, the update addressed allegations that duplicate filings, which occur with transferred cases, had distorted growth trends. An analysis of the Administrative Office's data on transferred cases indicates that over the last 10 years, between 1 and 2 percent of all filings have consistently been transfers; therefore, duplicate filings do not invalidate the data on federal court filings when used to evaluate trends.

In closing, the Working Group reiterated its belief that the growth in the number of product liability cases filed in federal courts is an accurate reflection of general trends in product liability (both in state and federal courts). The group stood by its conclusion that the data reflect tort system problems, which underlie insurance availability and affordability problems.

Objectives, Scope, and Methodology

Our goal was to (1) examine the nature and extent of growth, from 1974 to 1986, in the number of product liability cases filed in federal courts and (2) address some of the issues raised about the accuracy of the filing data and the extent to which generalizations can be based on them. Specifically, our objectives were to determine

- the effects of duplicate filings on the growth of product liability cases filed in federal courts;
- the percentage of the growth attributable to specific products, such as asbestos, which are thought to have contributed significantly to the filings increase; and
- the pattern of growth when specific product categories, such as asbestos, are eliminated.

We attempted to obtain information on personal injury filings related to four products that are thought to have been the subjects of significant amounts of litigation: asbestos, the Dalkon Shield, DES, and bendectin. We were unable to obtain information on the number of DES-related cases filed annually because of the sensitive nature of the data, given on-going litigation efforts.²⁸ Our analysis, therefore, is limited to examining the growth in the number of personal injury cases related to asbestos, the Dalkon Shield, and bendectin; these three products are among those thought to have been the subject of the largest number of suits between 1974 and 1985.²⁹

We also investigated the possibility of collecting data on product liability filings in state courts. We found the data generally unavailable because, in most states, centralized court information systems, traditionally, have not differentiated between product liability cases and other tort cases. We were able, however, to collect a small amount of data from previously conducted studies, manufacturers, and centralized data bases in two states. Using these data, we examined trends in the number of product liability cases filed in state courts and the percentage of cases filed in state courts as opposed to federal courts. These data do not cover the same time periods and cannot be generalized beyond specific products or locations. We report the data, however, (1) to make them widely available and (2) to test, at least partially, the assumption that

²⁸Eli Lilly and Company told us that as of March 24, 1987, the company had been a defendant in approximately 295 cases "that seek to recover damages on behalf of children or grandchildren of women who allegedly ingested DES or other synthetic estrogens during pregnancy."

²⁹Public Citizen, op. cit., p. 11.

the growth in state courts' filings matches the increase observed in federal courts.

Federal Court Filings

From the Administrative Office of the U.S. Courts, we obtained data on the number and type of product liability cases filed in federal courts. When a complaint is filed, the plaintiff's attorney indicates which standard case type (for example, product liability-personal injury or medical malpractice) best describes the nature of the suit. To help ensure accuracy, the court clerk is supposed to verify the attorney's selection and correct any mistakes.

We analyzed the data by the Administrative Office's reporting year (each year ends on June 30th), which is consistent with the Working Group's report. The first year for which product liability cases were reported separately in the Administrative Office's statistical system was 1974. Since then, seven subcategories of product liability cases have been reported: property damage; real property;³⁰ contracts;³¹ personal injury related to marine, motor, and aviation products; and other personal injury. In 1984, an eighth category, for asbestos-related personal injury, was added.

The Administrative Office's data are generally considered to be the best source for information on product liability filings. Because of resource constraints, we did not check case data against actual files (to confirm that the coding was correct); information on data reliability or validity was unavailable from the Administrative Office.

Duplicate Filings

The clerk of the court in each federal court assigns codes to cases according to whether they are original proceedings, removals from state courts, reopenings of previously closed cases, or transfers. According to the Administrative Office, an original proceeding or a removal from a state court denotes the initial filing of a case; a transfer or reopening is a duplicate filing. We considered cases other than original proceedings and state court removals, therefore, as duplicate filings. At our request, the Administrative Office provided us with data on initial filings only.

³⁰Real property suits involve damages to real estate (including lands and buildings, mineral rights, and crops attached to the land) that are alleged to have resulted from a defective product.

³¹The subcategory of contracts includes cases (1) involving disputes over contracts concerning the warranty of a product that has been found to be defective and (2) not involving property damage or personal injury.

These data were used in all analyses of federal court filings, except for the analysis specifically examining the effects of duplicate filings on growth estimates.

Asbestos Cases

We relied on several sources to estimate asbestos-related personal injury cases: (1) the Administrative Office's coding of asbestos cases in 1984-86; (2) the Federal Judicial Center's (FJC) analysis of cases filed against defendants named most often in asbestos litigation;³² and (3) claimant information compiled by the Asbestos Claims Facility (ACF), which is also known as the "Wellington Facility." ACF was established in 1985 to manage and assist in resolving personal injury claims brought against its members; it includes 33 manufacturers of asbestos-containing products and 15 insurers. The details of how we used the FJC and ACF data to identify product liability cases for asbestos-related personal injury are in appendix I.

To check the reliability of identifying asbestos cases using FJC's analysis and ACF's data, we calculated the percentage of agreement between the two sources in case classification for the years 1974-77 and for selected districts in 1978-86. The percentage of agreement ranged from 88 percent to 99 percent for individual districts and years. Overall, the agreement rate was 99 percent; that is, in 99 of every 100 cases, the two sources agreed on whether or not a case was an asbestos case.

Dalkon Shield Cases

The manufacturer of the Dalkon Shield, A.H. Robins Company, Inc., provided us with information on the number of Dalkon Shield-related filings in federal courts and state courts for each year since 1971, the first year in which a case was filed. The company receives filing information from local attorneys involved in Dalkon Shield litigation.

For most cases, the actual filing dates were available for determining the year filed. For cases with missing filing dates, A.H. Robins used the date the complaint was served on the defendant. Since federal rules of procedure require a complaint to be served within 120 days of filing, minimal error should be introduced by using the dates when complaints were served, assuming that the errors are randomly distributed across years.

³²T. Willging, Trends in Asbestos Litigation (Washington, D.C.: Federal Judicial Center, 1987).

A.H. Robins officials told us that they believe this filing information to be comprehensive and reliable. Although we could not directly verify it, we were able to compare this filing information with an estimate, derived by ICJ, of Dalkon Shield cases filed in federal courts.³³ This estimate is a count of the number of cases in the Administrative Office's data base that named defendants, such as A.H. Robins, known to have been involved in Dalkon Shield-related cases. The comparison between A.H. Robins's data and ICJ's estimate indicates high agreement in the number of Dalkon Shield cases. Most important, the two sets of data show essentially the same trend across years.

Bendectin Cases

Merrell Dow Pharmaceuticals Inc., the manufacturer of bendectin, provided us with information on the number of bendectin-related cases filed against the company in federal courts and state courts since 1977, the first year in which a case was filed. This information, compiled within the company by its Bendectin Litigation Group, includes a count of (1) the number of bendectin-related personal injury suits originally filed in federal courts and state courts and (2) the number removed from state courts to federal courts. For all cases, filing data were available for determining the year a case was filed.

State Court Filings

We obtained information on the number of product liability cases filed in state courts in Connecticut from 1979 to 1986; in Iowa, for 1981, 1983, and 1985; and in Massachusetts, from 1984 to 1986. These were the three states for which we were able to obtain information on product liability filings.

In addition, we collected nationwide data on (1) the number of Dalkon Shield cases filed from 1971 through 1986 and (2) the number of bendectin cases filed from 1977 through 1986 in state courts. We also obtained information filed in state courts on the percentage of cases against asbestos product manufacturers and the percentage of cases against members of the National Machine Tool Builders Association (NMTBA). NMTBA's membership includes approximately 300 manufacturers of metal-forming and metal-cutting equipment, who account for about 65 percent of current metal-cutting and metal-forming production in the United States. We examined filings against NMTBA members because the information was readily available from reports of the association's annual product liability survey.

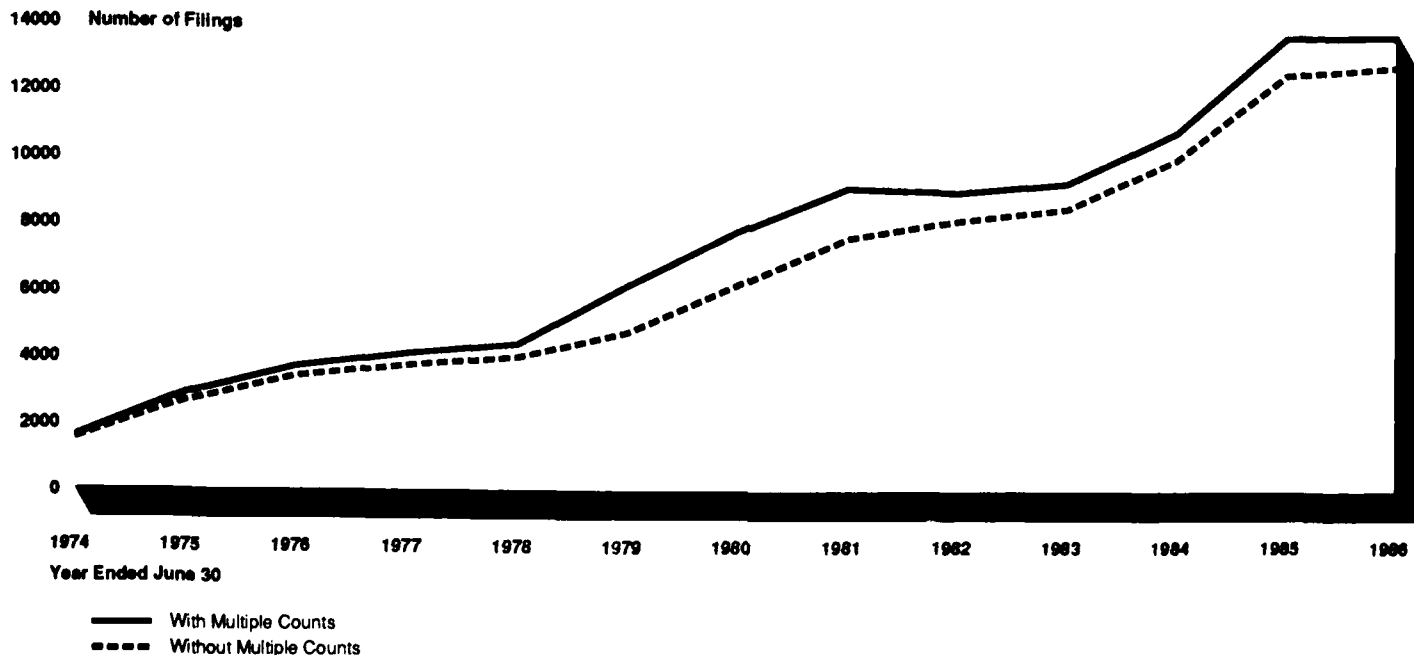
³³T. Dungworth, forthcoming report of the Institute for Civil Justice

A.H. Robins Company, Inc., provided us with data on Dalkon Shield-related filings in state courts. We obtained information on bendectin from Merrell Dow Pharmaceuticals Inc. Appendix I includes descriptions of the sources of other state data. Because of resource constraints and the varied nature of the information, we did not attempt to verify any of the state data by checking the information against either actual case files or independent sources.

Duplicate Filings Have Little Effect on Growth Rate

Our analysis indicates that, consistent with the Working Group's conclusion, duplicate filings have minimally affected estimates of the growth in the number of product liability cases filed in federal courts. The number of product liability cases filed in 1974-86, with and without duplicate filings, is shown in figure 2. The frequencies on which the figure is based are presented in table 1.

Figure 2: Effects of Multiple Counting on Product Liability Cases Filed in Federal Courts



Source: Administrative Office of the U.S. Courts.

Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned

Table 1: Total Product Liability Cases Including and Excluding Duplicates

Year ^a	Total product liability cases	
	Includes duplicates	Excludes duplicates
1974	1,579	1,516
1975	2,886	2,649
1976	3,696	3,410
1977	4,077	3,732
1978	4,372	3,979
1979	6,132	4,738
1980	7,755	6,159
1981	9,071	7,572
1982	8,944	8,097
1983	9,221	8,463
1984	10,745	9,931
1985	13,554	12,444
1986	13,595	12,697

Source: Administrative Office of the U.S. Courts.

^aThe first year in which the Administrative Office separately classified product liability cases is 1974.

Eliminating duplicate filings has virtually no effect on the percentage of growth over the time period. With duplicate filings, the number of cases increased from 1,579 to 13,595 (761 percent). When duplicate filings are eliminated, the growth is from 1,516 to 12,697 (738 percent).

Duplicate filings also have little effect on the rate of growth from year to year, as indicated by the almost identical shape of the two lines in figure 2. The most noticeable differences occur between 1978 and 1979 and between 1981 and 1982. When duplicate filings are eliminated, the line becomes less steep from 1978 to 1979 and, therefore, shows less growth; on the other hand, from 1981 to 1982, the line becomes steeper, thus showing more growth. The net effect of these two differences is a smoother line between 1978 and 1983, showing a more constant rate of growth without duplicate filings.

Asbestos Cases Account for a Significant Percentage of the Growth in Federal Filings

A significant percentage of the growth in product liability filings, according to our analysis, is attributable to increases in the number of cases filed for asbestos-related personal injury. In 1974-85, the time period examined by the Working Group, these cases account for 40 percent of the growth in total filings. When the time period is extended to 1986, asbestos cases account for 50 percent of the growth since 1974. For 1974-86, the estimated number of asbestos-related filings are shown in the first column of table 2. (Also shown are the number of filings related to the Dalkon Shield and bendectin, as well as the number of

suits remaining when cases related to the three products are subtracted from total filings. These data, along with total filings, are shown in figure 3.) As noted by others, the growth in asbestos personal injury cases has been significant, as shown in table 2. Filings in federal courts increased from only a few in 1974 to about 5,600 in 1986, totaling more than 20,000 in the entire time period. Although the number of filings has increased every year since 1974, the growth accelerated sharply after 1979, as shown in figure 3.³⁴

From 1974 to 1985, the number of nonasbestos cases filed in federal courts grew 433 percent, about three-fifths of the 721 percent increase in total filings including asbestos. Our estimate of the growth through 1985 in nonasbestos cases, 433 percent, is lower than the Working Group's estimated 500 percent increase from 1974 through 1985. This difference occurred (1) primarily, because duplicate filings were included in the Working Group's estimate, resulting in some overestimation of the percentage increase and (2) to a lesser extent, because we estimated a greater number of asbestos cases than were reported by the Administrative Office; its estimate was used in the Working Group's analysis.

When the time period is extended to include 1986, the percentage growth in nonasbestos cases is 368 percent, about one-half of the 738 percent growth including asbestos. The significant contribution of asbestos cases to total growth is reflected in the similarity in the upward trends for total filings and asbestos-related filings, a consistency that is particularly apparent from 1979 on, as shown in figure 4. In fact, from 1981 to 1986, asbestos-related cases account for about three-quarters of the growth in total filings.

Dalkon Shield and Bendectin Account for a Small Percentage of the Growth in Federal Filings

About 18 percent of the growth in filings from 1974 to 1985 is attributable to increases in personal injury cases related to the Dalkon Shield and bendectin. When the time period is extended to 1986, however, the two products together account for only 4 percent of the growth.

Since 1974, just under 5,000 Dalkon Shield-related cases have been filed in federal courts. Although to a lesser extent than asbestos-related cases, Dalkon Shield litigation has also increased dramatically from

³⁴Reasons for this upsurge include (1) in the late 1970's, the potential for compensation was widely recognized as a result of the courts' finding asbestos manufacturers liable for damages; (2) statutes of limitations were running out. See Hensler, *op. cit.*, pp. vii and xxviii.

**Table 2: Cases Filed Related to
Asbestos, Dalkon Shield, Bendectin, and
All Other Products**

Year	Asbestos	Dalkon Shield	Bendectin	Other products
1974	4	8	•	1,504
1975	35	82	•	2,532
1976	40	136	•	3,234
1977	103	153	1	3,475
1978	292	88	0	3,599
1979	361	125	0	4,252
1980	1,137	286	22	4,714
1981	1,625	388	50	5,509
1982	1,869	555	73	5,600
1983	1,926	472	171	5,894
1984	2,922	805	420	5,784
1985	4,389	1,410	594	6,051
1986	5,627	444	40	6,586

Sources: For asbestos, Administrative Office of the U.S. Courts, FJC, and ACF; for the Dalkon Shield, A.H. Robins Company, Inc.; and for bendectin, Merrell Dow Pharmaceuticals Inc.

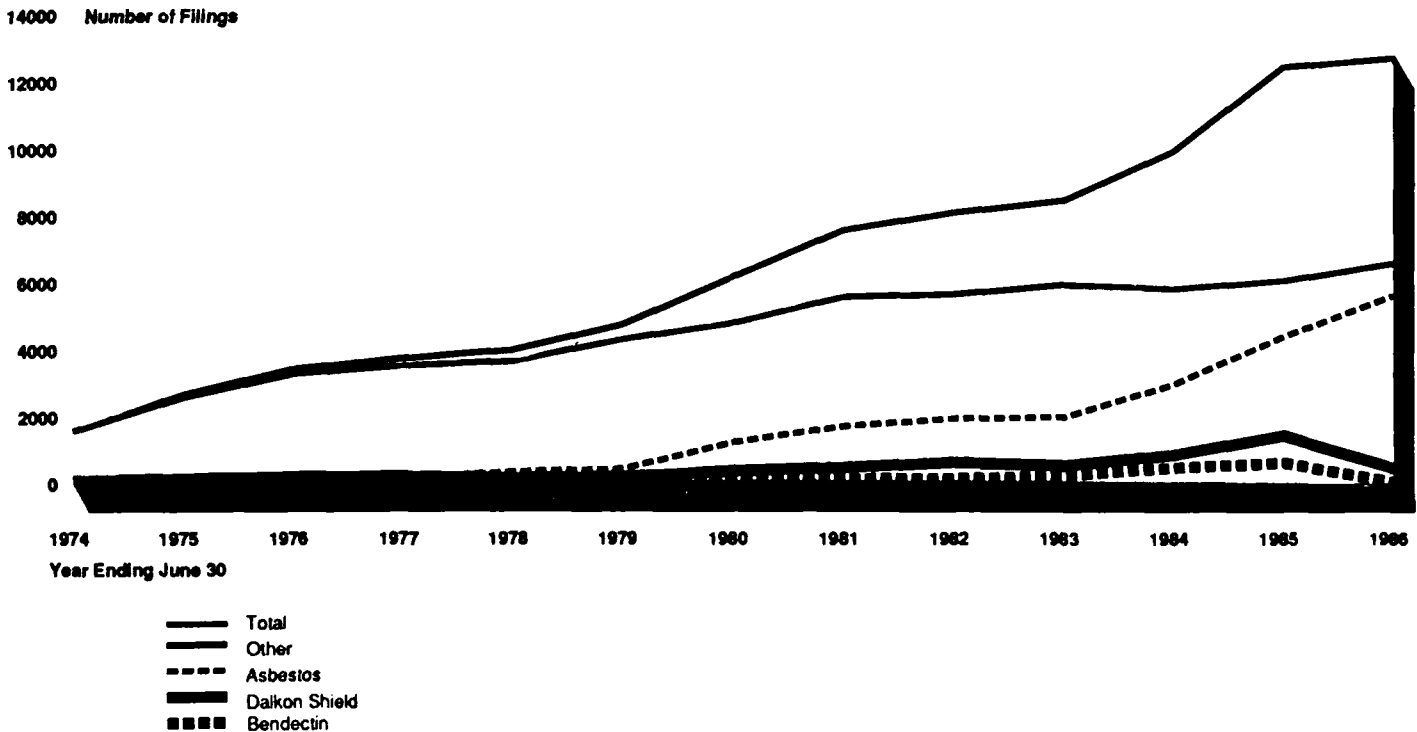
1974 (8 cases) to 1985 (1,410 cases) to 1986 (444 cases). The peak in 1985 may be the result of publicity issued in October 1984 recommending that the Dalkon Shield not be used. Anticipation of A.H. Robins's bankruptcy filing, which occurred in August 1985, may also account for the surge in suits.

As shown in table 2, just over 1,400 bendectin-related suits have been filed against its manufacturer since 1977. Three-fourths of these suits, 1,014, were filed in 1984-85. Like Dalkon Shield cases, the number of bendectin-related suits peaked in 1985. In the short period since then, the number of cases filed has decreased dramatically, from 594 in 1985 to 40 in 1986. According to one company official, the number of filings dropped in 1986 because a 1985 court decision—ruling that the alleged causal relationship between bendectin and birth defects had not been established—discouraged people from filing suits.

As shown in figure 3, compared with asbestos, the increase in filings related to the Dalkon Shield and bendectin have contributed relatively little to the growth in federal filings. Between 1974 and 1985, the time period examined by the Working Group, the Dalkon Shield accounts for 12 percent and bendectin account for 5 percent of the growth in total

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Figure 3: Asbestos, the Dalkon Shield, Bendectin, Other, and Total Product Liability Cases Filed in Federal Courts



Sources: Administrative Office of the U.S. Courts, FJC, ACF, A. H. Robins Company, Inc., and Merrell Dow Pharmaceuticals Inc.

filings. Through 1985, cases related to asbestos, the Dalkon Shield, and bendectin combined account for 58 percent of the total growth. Since 1985, however, the number of filings related to the two products appears to have started a downward trend, which may signal the end of the growth in suits related to these products. When the time period is extended to 1986, the total growth attributable to the Dalkon Shield decreases to 3 percent and the growth attributable to bendectin drops to less than 1 percent of total growth. From 1974 to 1986, about 54 percent of total growth is attributable to asbestos, the Dalkon Shield, and bendectin. In that time period, cases unrelated to the three products increased 338 percent (see table 3 and fig. 4).

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Table 3: Growth in Product Liability Filings With and Without Personal Injury Cases Related to Asbestos, the Dalkon Shield, and Bendectin, 1974-86

Year	Percentage growth from 1974	
	Total filings	Filings unrelated to asbestos, the Dalkon Shield, and bendectin
1974	•	•
1975	75	68
1976	125	115
1977	146	131
1978	162	139
1979	212	183
1980	306	213
1981	399	266
1982	434	272
1983	458	292
1984	555	285
1985	721	302
1986	738	338

Sources: Administrative Office of the U S Courts, FJC, ACF, A.H. Robins Company, Inc., and Merrell Dow Pharmaceuticals Inc

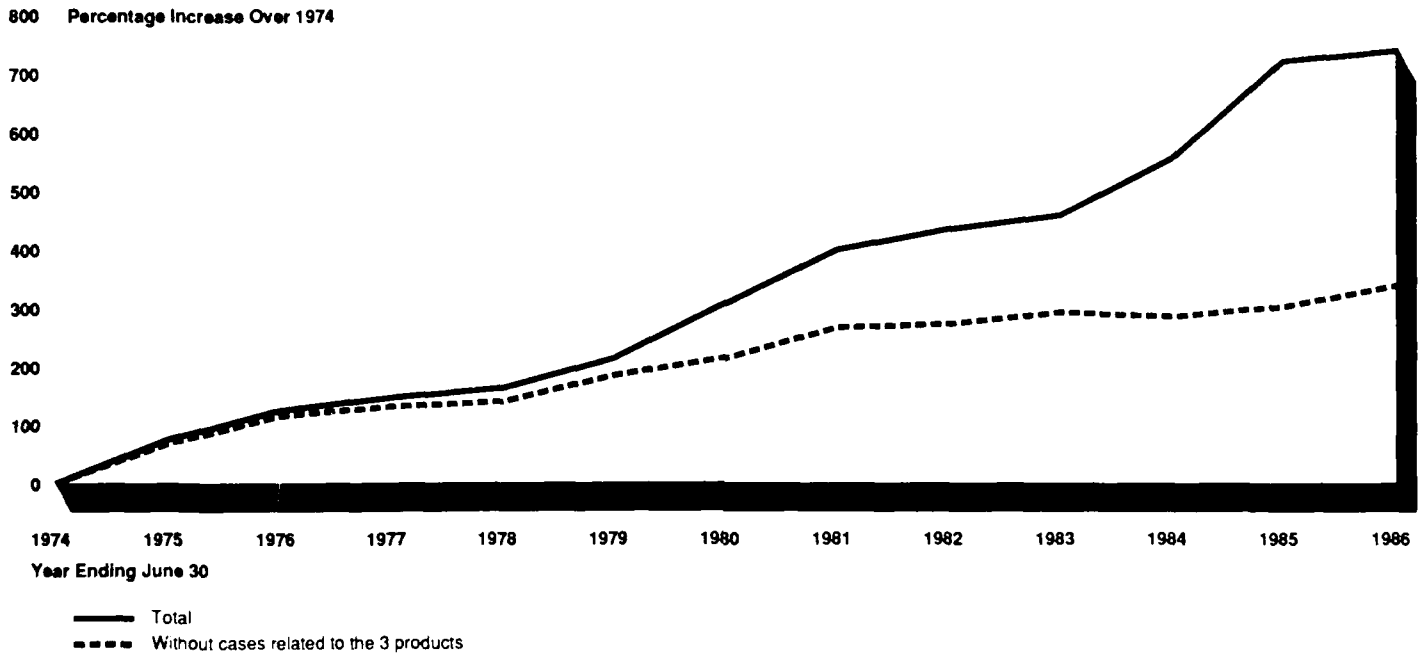
Changes in Data Coding Procedures May Have Affected Growth Estimates

Changes in data coding procedures in 1974-75 may account for some of the growth in cases unrelated to asbestos, the Dalkon Shield, and bendectin. Calculating percentage growth in cases from 1974, therefore, may overstate both growth unrelated to the three products, as well as total growth including the three products.

In the middle of the reporting year 1975 (that is, January), the Administrative Office completed phasing in a change in the responsibility for assigning case type. Until then, headquarters staff had coded the case type based on brief descriptions submitted by district court personnel. Under the new system (still in use today), when filing cases, attorneys indicate which standard case type describes the nature of the suit (see p. 16). This change in coding case type might have had an effect on growth trends; we do not know the effect, however, because information comparing classifications by headquarters staff with those of attorneys is unavailable. Some of the differences in the number of product liability filings before and after the change may, in part, reflect this change rather than real differences in the number of filings.

During the same time period in which this change was being implemented, the classification of product liability cases also changed. In 1974, for the first time, product liability cases were separately coded in

Figure 4: Growth in Product Liability Filings With and Without Personal Injury Cases Related to Asbestos, the Dalkon Shield, and Bendectin, 1974-86



Sources: Administrative Office of the U.S. Courts, FJC, ACF, A.H. Robins Company, Inc., and Merrell Dow Pharmaceuticals Inc.

Percentages exclude duplicate filings.

the Administrative Office's statistical system. Before then, product liability cases were included in general categories of contracts or tort filings (for example, personal injury). This change in how product liability cases were classified might also have affected the growth trend. For example, cases that belong in the new coding category may be underreported in the first years of implementation, as people who provide the information that is coded and the coders themselves become accustomed to it. Some cases that should be coded in the new category (for example, personal injury product liability) may still be coded in the old category (for example, personal injury). As to product liability, such miscoding may have occurred because (1) district court personnel who provided case descriptions failed to include the additional information needed to identify a product liability case and (2) headquarters coders were unfamiliar with the new code. According to the Administrative Office, some clerks of the court believe that asbestos cases were underreported in 1984, the first year asbestos cases were coded separately from other

product liability cases.³⁵ If underreporting occurred during the first years (1974-75) that product liability cases were coded separately from other personal injury cases, the baseline from which growth is measured is lower than it should be. The magnitude of growth, then, in succeeding years will overstate actual growth.

It is impossible to separate the possible effects these procedural changes may have had from the effects of real changes in the filing rate; growth in the early years, however, is exceptionally large and shows a pattern consistent with what would have been expected had cases been underreported during 1974-75. If product liability cases were underreported in the early years and more accurately reported over time, we would expect to find a relatively large increase in filings shortly after 1974, when the new system was introduced. In fact, product liability filings unrelated to asbestos, the Dalkon Shield, and bendectin grew more (115 percent) between 1974 and 1976 than in any other 2-year period. This increase from 1,504 cases in 1974 to 3,234 cases in 1976 constitutes fully one-third of the total percentage growth through 1986 (see fig. 3).

Substantial growth in this 2-year period is apparent for five of the seven categories of product liability cases (see p. 16) that have been reported by the Administrative Office since 1974. The number of filings in each subcategory are shown in table 4. For five of the seven subcategories (contracts, real property, property damage, and marine and aviation personal injury), the percentage of growth between 1974 and 1976 approximates or exceeds one-half the total increase in these subcategories through 1986.³⁶

³⁵This year is the only one for which we have information on the accuracy of asbestos counts.

³⁶This substantial growth between 1974 and 1976 may be an indicator of an earlier litigation explosion. Around 1977, there had been insurance availability and affordability problems; allegations were made that those problems were the result of increasing filings, among other factors.

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Table 4: Product Liability by Case Type

Year	Case type						
	Contract	Real property	Property damage	Personal injury			Other ^a
				Marine	Aviation	Motor vehicle	
1974	70	12	93	11	97	303	918
1975	271	41	168	44	143	417	1,448
1976	348	45	264	138	148	372	1,919
1977	387	50	248	148	173	344	2,125
1978	421	44	280	130	202	335	2,187
1979	406	49	329	121	226	441	2,680
1980	451	49	347	73	241	516	3,037
1981	494	86	408	58	226	468	3,769
1982	476	71	438	75	268	524	3,748
1983	568	78	488	126	307	533	3,794
1984	584	68	358	99	333	615	3,727
1985	543	74	374	106	217	565	4,172
1986	541	76	456	82	179	627	4,625

Sources: Administrative Office, FJC, ACF, A H Robins Company Inc., and Merrell Dow Pharmaceuticals Inc.

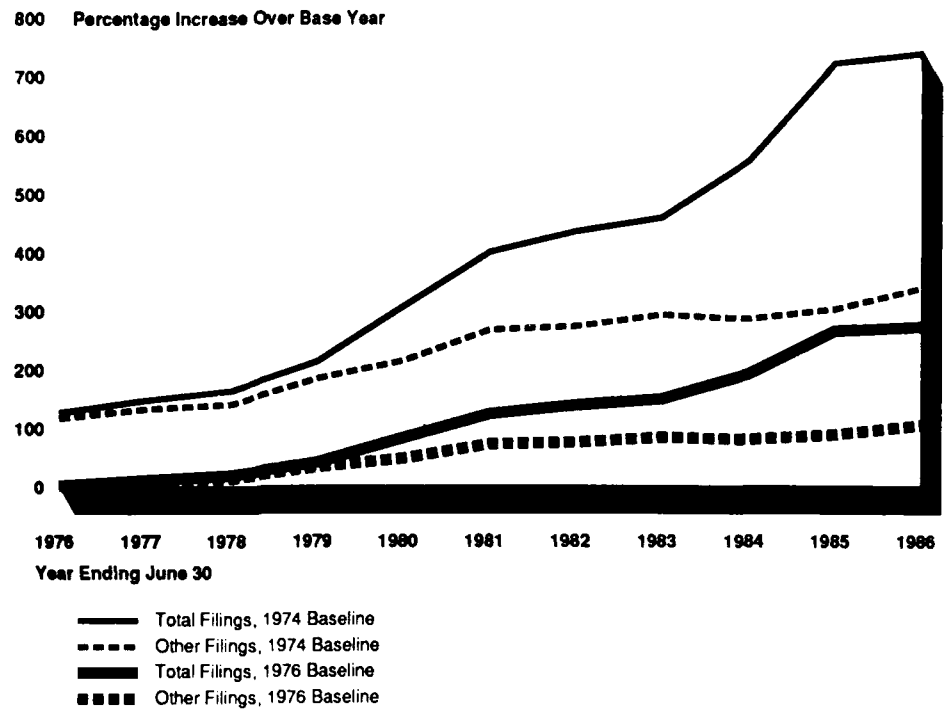
^aExcludes cases related to asbestos, the Dalkon Shield, and bendectin

Because of the procedural changes made in 1974 and 1975, we believe a more appropriate baseline year for examining the growth in filings is 1976. Procedures used to identify product liability cases in 1976 would be comparable with those of subsequent years. In addition, 1976 data are less susceptible than earlier years to the possible effects (for example, underreporting) of introducing a new coding category. Data from 1976 are possibly still less reliable than data from later years, when the 1974-75 procedural changes may have been even better established and the data more reliable. The more obvious threats to validity that existed in earlier years, however, are absent in 1976.

For total filings and filings unrelated to the three products we examined, the percentages of growth from 1976 to 1986, using two baselines—the old 1974 and the new 1976—are shown in figure 5. Using 1976 as the baseline year (when 3,410 cases were filed), total product liability filings grew 272 percent, and cases unrelated to asbestos, the Dalkon shield, and bendectin grew 104 percent. The growth since 1976 is about one-third the growth calculated, using 1974 as the baseline year. Since 1976, the percentage of total growth attributable to asbestos has been

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Figure 5: Percentage Growth With 1974
and 1976 Baselines



Sources: Administrative Office of the U.S. Courts, FJC, ACF, A.H. Robins Company, Inc., and Merrell Dow Pharmaceuticals Inc.

60 percent (as compared with the 50 percent accounted for by the product since 1974). The Dalkon Shield accounts for only about 1 percent of the growth since 1976 (as compared with 4 percent since 1974). The growth attributable to bendectin is less than 1 percent using either year as the baseline.

Growth Rate Peaked Between 1979 and 1981

From 1976 to 1986, product liability filings unrelated to asbestos, the Dalkon Shield, and bendectin increased an average of about 8 percent per year. The largest annual percentage increases, however, occurred in the 3 years from 1979 to 1981. In 1979, product liability cases increased 18 percent; in 1980, 11 percent; and in 1981, 17 percent.

The growth rate from one year to the next for product liability cases, excluding cases related to asbestos, the Dalkon Shield, and bendectin, are shown in table 5. For comparison purposes, the growth rate for civil filings and personal injury cases, excluding product liability, are also shown. Between 1976 and 1986, the growth in civil filings in general was distorted by significant trends in recovery for overpayment cases and, to a lesser extent, filings related to black lung disease.³⁷ The growth in civil filings, therefore, was calculated excluding filings for these cases, as well as product liability filings.

³⁷ Recovery for overpayment cases includes lawsuits to collect (1) outstanding student loan paybacks and (2) overpayments to veterans. These cases increased from 1,087 in 1976 to 40,824 in 1986; black lung-related cases decreased from 4,908 in 1976 to 93 in 1986. The decrease in black lung cases resulted from the transfer of jurisdiction over such cases to the Department of Labor and the transfer of jurisdiction for appeals of the Department's decisions to the U.S. Court of Appeals.

**Table 5: Growth Rate in Civil, Personal
Injury, and Product Liability Filings, 1976-
86**

Year	Case type		
	Civil ^a	Personal injury ^b	Product liability ^c
1976	d	d	d
1977	1.9	-4.5	7.5
1978	6.8	1.1	3.5
1979	5.5	1.4	18.3
1980	4.5	10.9	10.9
1981	5.5	2.5	16.7
1982	14.6	4.6	1.7
1983	9.0	13.9	5.3
1984	6.9	-1.4	1.9
1985	-1.3	5.3	4.6
1986	.8	2.9	8.8

Sources: The Administrative Office of the U.S. Courts, FJC, ACF, A H. Robins Company, Inc., and Merrell Dow Pharmaceuticals Inc.

^aExcludes filings related to product liability, recovery for overpayment, and black lung disease

^bExcludes product liability cases.

^cExcludes filings related to asbestos, Dalkon Shield, and bendectin

^dSince the time period begins with 1976, we do not include percentage growth from 1975 to 1976

Perhaps the most striking feature of table 5 is the erratic pattern of growth for all three types—product liability, civil filings, and personal injury—of cases. Growth rates for product liability are all positive, indicating that there has been an increase in the number of filings in each year. The growth rates, however, are not constant across years and, for the most part, show a seesaw pattern in which a relatively large rate of growth is followed by a smaller growth rate that, in turn, is followed by a larger growth rate.

The peak from 1979 to 1981 in growth rate for product liability cases is apparent. Three subcategories of product liability cases—real property, property damage, and other personal injury—mirror the amount and pattern of growth across those 3 years. The factors contributing to the relatively large growth spurts, however, are not readily apparent. A surge in overall litigiousness could have occurred. An increased preference for filing in federal court over state court could also have occurred; since a variety of factors affect whether cases are filed in state court or

federal court,³⁸ what specifically might account for this preference is unclear.

The growth spurts in 1979-81 may also be related to litigation about specific products that were outside the scope of this study. For example, product liability-personal injury cases filed against the U.S. government increased sharply after 1978, primarily as a result of plaintiffs' seeking to recover for injuries allegedly produced by the swine flu vaccine. Cases in which the government was the defendant increased: in 1978, 82; in 1979, 273; in 1980, 347. After 1980, cases against the government declined steadily, reaching a low of 20 cases in 1986. A surge in cases related to Agent Orange occurred between 1979 and 1981. We were only able to obtain information on the number of Agent Orange-related cases that had been combined for multidistrict litigation (that is, for pretrial procedures and disposition). For calendar years 1979 through 1981, the number of these Agent Orange cases filed was 34 in 1979, 144 in 1980, 181 in 1981, and 118 in 1982.

Civil filings and personal injury cases, excluding product liability, also show erratic patterns of growth across the 10 years and, unlike product liability, show some years of decline. The growth rate for civil filings in general peaked in 1983, with a 15 percent increase in cases from 1982. This peak primarily reflects large increases in cases related to Social Security disability; "security, commodities, and exchange";³⁹ insurance contracts; and civil rights and employment issues. Relatively large increases for personal injury cases, which may be accounted for by increases in medical malpractice claims, occurred in 1980 and 1983.

Very dissimilar patterns of growth across the three categories—civil, personal injury, and product liability—are apparent. There is little correlation between the growth rates from year to year. Although the years of greatest growth for all three categories tend to cluster between 1979 and 1983, the peak years differ across the three categories and show little relationship to each other.

³⁸K. Bumiller, "Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform," Civil Litigation Research Project, Working Paper 1980-3 (Madison, Wis.: University of Wisconsin Law School, 1980).

³⁹This category primarily includes cases related to regulation of business enterprises, as specified in 15 U.S.C. 77-80, 687, and 714 (1983).

From 1976 to 1986, product liability cases unrelated to asbestos, the Dalkon Shield, and bendectin grew at a faster rate than other civil filings and personal injury cases. Compared with the total growth of 104 percent and an average annual increase of 8 percent for product liability cases, civil filings in general grew 66 percent (an average of 5 percent per year) between 1976 and 1986.⁴⁰ During the same time period, personal injury cases unrelated to product liability increased 42 percent (about 4 percent per year). The larger growth rate for product liability cases, however, occurred before 1981. Since 1981, product liability cases have grown at about the same rate as other civil filings and personal injury cases, with average annual increases of 4 percent for product liability, 6 percent for civil filings, and 5 percent for personal injury cases.

State and Federal Filings Show Similar Trends but Differ in Growth Rate

We had sufficient data to compare trends in state courts and federal courts for cases related to Dalkon Shield and bendectin filed nationwide, all product liability cases filed in Connecticut, and all product liability cases (other than those related to contracts) in Iowa. For all four sets of data, state court filings matched federal court filings in the direction of change (that is, whether they increased or decreased), but not necessarily in the rate or extent of growth. A trend toward filing in federal court was apparent.

Data for the Dalkon Shield are shown in table 6 and figure 6. Although trends are similar across the entire time period, between 1974 and 1981, Dalkon Shield-related filings in federal courts and state courts showed noticeable differences. For example, between 1979 and 1981, filings in state courts grew at almost double the rate of those in federal courts. Filings in both courts fell in 1983. From 1984-86, the number of Dalkon Shield-related filings in federal courts closely approximated the number filed in state courts. Except for sporadic years before 1984 (for example, 1974 and 1978-79), filings in federal courts were considerably lower than those in state courts.

⁴⁰In addition to excluding product liability cases, this growth rate was also calculated excluding filings related to recovery for overpayment and black lung disease. Including these two categories, civil filings grew 90 percent from 1976 to 1986.

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**Table 6: Dalkon Shield-Related Cases
Filed in State and Federal Courts**

Year	State courts		Federal courts	
	Number	Percentage change	Number	Percentage change
1974	32	^a	8	^a
1975	212	562.5	82	925.0
1976	290	36.8	136	65.9
1977	249	-14.1	153	12.5
1978	152	-39.0	88	-42.5
1979	150	-1.3	125	42.0
1980	490	226.7	286	128.8
1981	709	44.7	388	35.7
1982	786	10.9	555	43.0
1983	594	-24.4	472	-17.6
1984	890	49.8	805	70.6
1985	1,542	73.3	1,410	75.2
1986	413	-73.2	444	-68.5

Source: A.H. Robins Company, Inc.

^aSince the data we report begin with 1974, we do not include percentage growth from 1973 to 1974.

Figure 6: Dalkon Shield-Related Cases Filed in State and Federal Courts



Source: A.H. Robins Company, Inc.

For bendectin-related filings nationwide, patterns of growth in state courts departed even more than Dalkon Shield cases from the patterns found in federal courts. As shown in table 7 and figure 7, up to 1982, the number of bendectin-related filings grew at about the same rate in state courts and federal courts. From 1982 to 1985, however, the growth rate in federal courts was almost double the rate in state courts. In 1986, filings dropped dramatically in both courts. As stated earlier, this drop may have resulted from a 1985 court decision ruling that the alleged causal relationship between bendectin and birth defects had not been demonstrated.

Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned

Table 7: Bendectin-Related Cases Filed in State and Federal Courts

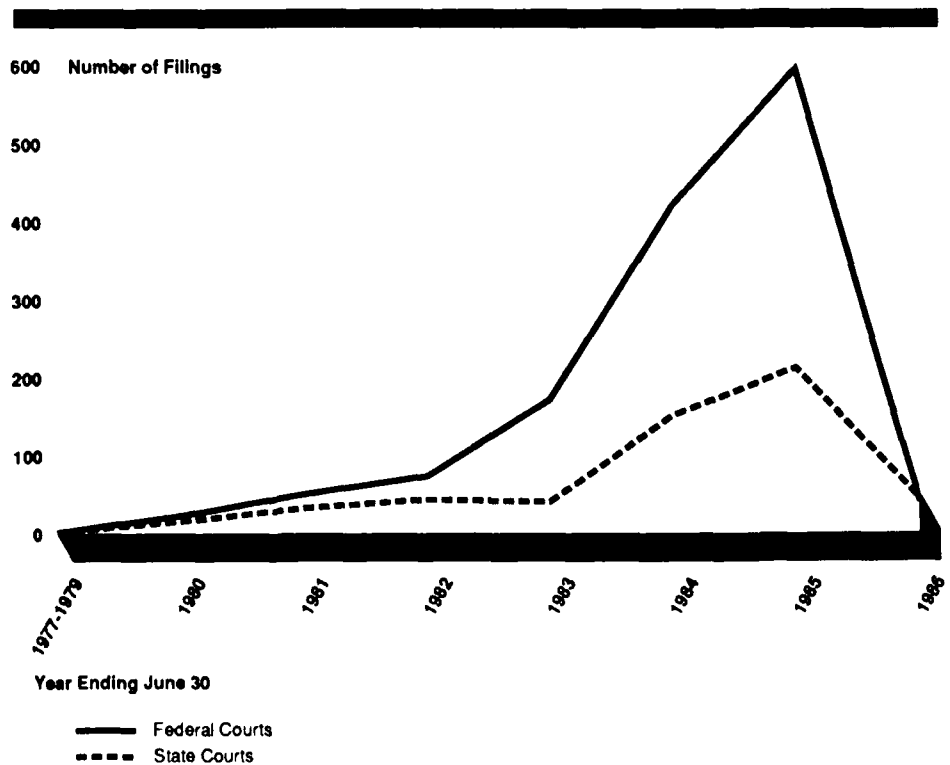
Year	State courts		Federal courts	
	Number	Percentage change	Number	Percentage change
1977-79	1	^a	1	^a
1980	15	1,400.0	22	2,100.0
1981	32	113.3	50	127.3
1982	43	34.4	73	46.0
1983	40	-7.0	171	134.2
1984	151	277.5	420	145.6
1985	212	40.4	594	41.1
1986	44	-79.2	40	-93.3

Source: Merrell Dow Pharmaceuticals Inc.

Note: In 1977-86, 261 cases were filed in state courts and then removed to federal courts. Since these cases would have been counted as filings in both state and federal courts, these cases are included under state court and federal court filings. Eliminating these duplicate filings, there were 1,648 bendectin-related cases filed against Merrell Dow Pharmaceuticals Inc. between 1977 and 1986. Since 1986, 20 cases have been filed in state courts and 23 cases have been filed in federal courts.

^aSince there were no bendectin cases before 1977, we do not include percentage growth from 1976 to 1977-79.

Figure 7: Bendectin-Related Cases Filed in State and Federal Courts



Source: Merrell Dow Pharmaceuticals Inc.

In Connecticut, the different patterns of growth in state courts and federal court (that is, U.S. District Court in Connecticut) are shown in table 8 and figure 8. From 1979 to 1986, Connecticut filings show an overall increase, as with the Dalkon Shield and bendectin, in both state courts and the federal court. State court filings show steady growth over the time period, except for 1981; federal court filings, on the other hand, show erratic growth. The number of cases filed in federal court, however, has not always shown such an erratic pattern. For example, in the 3 years immediately preceding 1979-86, filings in federal court steadily increased from one year to the next.

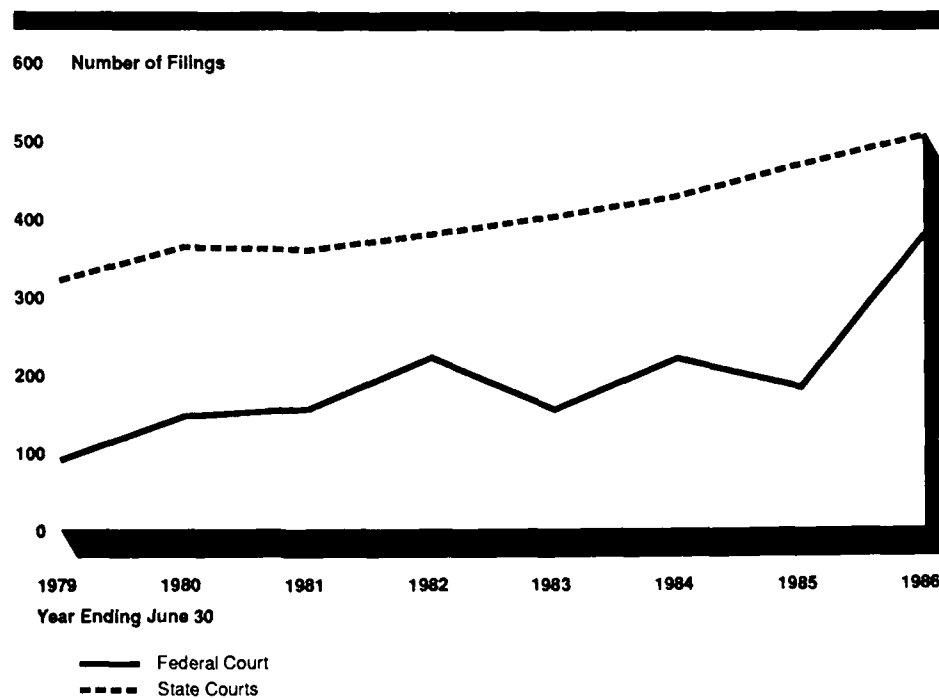
Table 8: Product Liability Cases Filed in Connecticut

Year	State courts		Federal court	
	Number	Percentage change	Number	Percentage change
1979	320	^a	89	^a
1980	362	13.1	145	62.9
1981	358	-1.1	154	6.2
1982	378	5.6	220	42.9
1983	400	5.8	153	-30.5
1984	425	6.3	218	42.5
1985	465	9.4	180	-17.4
1986	501	7.7	374	107.8

Sources: For cases filed in state court, Office of the Chief Court Administrator, State of Connecticut, for cases filed in federal court, the Administrative Office of the U.S. Courts

^aSince the data we report begin with 1979, we do not include percentage growth from 1978 to 1979

**Figure 8: Product Liability Cases Filed
in Connecticut**



Sources: For cases filed in state courts, Office of the Chief Court Administrator, Connecticut; for cases filed in federal courts, the Administrative Office of the U. S. Courts.

In Iowa, from 1981 to 1985, the pattern of growth in state courts also differed from that observed in federal court (that is, U.S. District Court in Iowa). In addition, in Iowa, as shown in table 9, filings fail to show the increasing trends evident for Connecticut and for filings related to the Dalkon Shield and bendectin across all states. Product liability filings in Iowa's state courts actually decreased from 248 in 1981 to 139 in 1985. Since we do not have data on filings in Iowa's state courts in 1982 and 1984, we cannot determine whether filings have steadily decreased or shown an erratic trend (for example, increasing in some years and decreasing in others). The federal court data show an erratic trend, but a more stable filing rate across the years when compared with the state court data.

Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned

Table 9: Product Liability Cases Filed in Iowa^a

Year	State courts	Federal court
1981	248	50
1982	^a	70
1983	184	60
1984	^a	66
1985	139	56

Sources: For cases filed in state courts, the National Center for State Courts, Iowa Tort Liability Study (Sept. 15, 1986); for cases filed in federal courts, the Administrative Office of U S Courts

^aThis does not include cases related to contracts (see p 16, n 31)

^bEstimates for 1982 and 1984 were not available

The difference between filing trends in Connecticut and Iowa (with Connecticut's increasing and Iowa's stable or decreasing) may, at least in part, be a result of differences in the number of asbestos-related filings. Many more claimants have filed asbestos personal injury cases in Connecticut than in Iowa. On the basis of ACF's list of claimants since 1978, about 1,300 claimants have filed suits in Connecticut (in state courts or federal court or both) against asbestos products manufacturers. During the same time period, only 69 claimants brought asbestos-related suits in Iowa. Trends in Connecticut's courts, then, would have been more affected than Iowa's courts by the increasing number of asbestos filings since 1979. The National Center for State Courts has reported similar state differences for trends in all tort cases and small claims filings.⁴¹ The differences between Iowa and Connecticut, therefore, may also be a function of factors, other than asbestos litigation, that influence trends broadly across various case types.

An increasing trend towards filing product liability suits in federal courts rather than state courts is evident to some degree for Dalkon Shield and bendectin cases filed nationwide and for product liability cases filed in Connecticut and Iowa. In 1976, about one-third of all Dalkon Shield personal injury cases were filed in federal courts. By 1986, however, federal court filings accounted for about 50 percent of total filings. For bendectin-related cases after 1982, there was an increasing trend toward filing in federal courts. Although not as uniform as the trend for cases related to Dalkon Shield and bendectin, the percentage of product liability cases filed in federal court increased in Connecticut, from 22 percent in 1979 to 43 percent in 1986, and in Iowa, from 17 percent in 1981 to 29 percent in 1985. It should be noted that

⁴¹R. Roper, "The Propensity to Litigate in State Trial Courts, 1981-1984, 1984-1985," *The Justice Journal*, Vol. XI (1986), pp 262-83.

this trend in Iowa resulted primarily from a decrease in the number of state court filings rather than an increase in the number of federal court filings.

Percentage of Cases Filed in Federal Courts Vary by State and Product

Part of the debate over the significance of trends in federal court filings has focused on the small percentage of product liability cases thought to be filed in federal courts as opposed to state courts. We have therefore calculated the percentage of these cases filed in the two courts for the following three states—Connecticut, Iowa, and Massachusetts—and four products—bendectin, the Dalkon Shield, asbestos, and those manufactured by NMTBA members. The percentage of cases filed in federal courts (1) vary across states and by product type and (2) are generally higher than some have argued.

Fewer product liability cases were filed in Connecticut and Iowa federal courts than in their state courts. Between 1979 and 1986, 32 percent of all product liability cases in Connecticut were filed in federal court. In the 3 years for which we have data on filings in Iowa (that is, 1981, 1983, and 1985), only 23 percent of all cases were filed in federal court. Unlike filings in Iowa and Connecticut, in Massachusetts over the past 3 years, more product liability cases have been filed in federal court than in state courts. From 1984 through 1986, a total of 3,879 product liability cases were filed in Massachusetts: 2,568 (66 percent) in federal court and 1,311 (34 percent) in state courts.⁴²

State differences in the percentage of cases filed in state courts versus federal courts may be associated with differences in the amount of asbestos-related filings. Massachusetts has far outpaced the other two states for these filings in federal court. In Massachusetts for 1984-86, 72 percent of all product liability cases filed in federal court (1,843 cases) were asbestos-related personal injury cases. Between 1984 and 1986, 51 percent in Connecticut (393 cases) and 2 percent in Iowa (3 cases) of all product liability cases filed in federal court were asbestos-related. In addition, the ACF data indicate that since the early 1970's, many more people have filed asbestos claims in Massachusetts than in the other two states. Over 5,700 people have filed claims in Massachusetts against asbestos products manufacturers as opposed to 1,300 in Connecticut and 69 in Iowa.

⁴²For 1984, 820 filings in federal court and 461 in state courts; for 1985, 1,209 in federal court and 370 in state courts, and, for 1986, 539 in federal court and 480 in state courts.

Filings related to the four products for which we have data also varied in their distribution across federal courts and state courts. More benedectin-related suits have been filed in federal courts than in state courts. Even counting removals from state courts to federal courts as only state court filings, about 67 percent of benedectin-related suits were only filed in federal courts. Filings related to Dalkon Shield and asbestos were fairly evenly split between the two court systems. About 43 percent of all Dalkon Shield personal injury cases filed since 1974 have been brought in federal courts. ICJ reported that through 1985, asbestos cases were filed at about the same rate in federal courts and state courts.⁴³ ACF estimated that historically, about 45 percent of all claimants filing lawsuits against asbestos manufacturers did so in federal courts.

Unlike cases related to these three products, state filings against NMTBA members have outnumbered federal cases three to one since 1984. Thus, only about 23 percent of filings in 1984-86 were in federal courts. This percentage varied somewhat across years: for 1984, 31 percent; for 1985, 23 percent; and for 1986, 16 percent.

In general, we found the percentages of product liability cases filed in federal courts as opposed to state courts are greater than the percentages of all tort filings (of which, as mentioned earlier, product liability is a subset) in federal courts; the lowest percentage for product liability cases filed in federal courts is 23 percent for both Iowa and NMTBA members. ICJ and Public Citizen have estimated the percentage of all tort filings brought in federal courts, as opposed to state courts, to be 5 percent.⁴⁴

Conclusions and Implications

Duplicate filings had little effect on trends. In 1974-75, procedural changes in how cases were classified, however, may have distorted the actual growth in filings. When the baseline year is adjusted (from 1974 to 1976) to minimize possible effects of these changes, product liability filings in federal courts grew 272 percent from 1976 to 1986. This is about one-third the 738 percent growth from 1974 to 1976.

Our analysis also indicates that one product, asbestos, accounts for a large part of the growth. Asbestos personal injury cases alone account for 60 percent of the growth in 1976-86 and for 75 percent of the

⁴³Hensler, op. cit., p. 21.

⁴⁴See footnote 9.

growth since 1981. Dalkon Shield cases account for about 1 percent of the increase in 1976-86, down from 12 percent in 1976-85. Similarly, less than 1 percent of growth in 1976-86 is attributable to bendectin-related personal injury, which was down from 5 percent in 1976-85. We were unable to determine the specific number of filings related to other products, such as DES or Agent Orange, which are also thought to have contributed significantly to the trend in federal filings. Analyses soon to be released by the ICJ, however, may examine the number of cases related to such products.⁴⁵

The state data, although far from comprehensive, suggest that there may be good reasons for not assuming that the extent of growth in federal court filings represents trends in state courts. State court filings matched federal court filings in the direction of change in all four instances where we could test this assumption. If filings in federal courts showed an increase, state cases also increased; in Iowa, where federal court filings remained relatively constant across years, state court filings showed a decrease. For all comparisons between trends in state courts and federal courts, however, significant departures were apparent in the pattern and extent of growth across the time periods for which we had data. The differences we observed by product type, state, and year make it difficult to speculate about nationwide trends in state courts; these differences increase our reservations about generalizing from the federal courts to state courts.

We found that a greater percentage of product liability cases were filed in federal courts than had been estimated previously. In light of this finding, although our data cannot be assumed to represent the bulk of product liability cases, federal court cases may be a more significant component of product liability litigation than some have argued.

The growth in filings unrelated to asbestos, the Dalkon Shield, and bendectin appears to be neither accelerating nor explosive, although these filings have doubled over the last 10 years. Federal court filings excluding cases related to these three products increased 104 percent in 1976-86. During this time, the increase from one year to the next averaged just under 8 percent and only exceeded 10 percent for the 3 years between 1979 and 1981. The growth rate has dropped off since 1981, averaging 4 percent per year.

⁴⁵T. Dungworth, *op. cit.*

Overall, product liability filings unrelated to asbestos, the Dalkon Shield, and bendectin increased more than both civil filings in general and personal injury cases other than product liability. Since 1976, civil filings (excluding cases related to product liability, recovery for overpayment, and black lung disease) have increased 66 percent; personal injury cases other than product liability have increased 42 percent. Since 1981, however, product liability cases have increased at about the same rate as these other civil filings and personal injury cases.

The growth rate within each of the three categories of cases (product liability, civil filings in general, and personal injury cases other than product liability) varied widely from year to year. The erratic pattern of growth within each category is not too surprising since major movements in any one subcategory, such as asbestos within product liability, can have a large impact on overall trends. Variability in the annual growth rates suggests that many factors may influence filing rates. Although comparisons between broad categories (such as product liability, civil filings, and personal injury cases) may be informative about overall relative growth, differences between the three categories have little meaning without information about patterns of change and the types of cases contributing to changes.⁴⁶

Clearly, the growth in asbestos filings is exceptional—a 14,000 percent increase in cases since 1976. This growth may reflect the widespread nature of asbestos use and the substantial period of time during which people were exposed to its potential dangers.⁴⁷ This growth may also relate to a number of other factors, such as (1) recent manifestations and diagnoses of asbestos-related diseases resulting from exposure years before; (2) the severity of the diseases; (3) the uncovering of information concerning hazards of the diseases and the liability of others for injuries; and (4) the emergence of plaintiffs' attorneys experienced in asbestos-related litigation. It should also be kept in mind that the baseline from which growth is calculated for asbestos cases is very small (that is, 40 cases in 1976).

Information uncovered in early suits and communications about initial litigation efforts may play an important role in the instigation of later

⁴⁶For an example of such analyses, see Galanter, *The Day After the Litigation Explosion*, op. cit., pp. 3-39.

⁴⁷For an in-depth discussion of possible factors influencing the "explosion" in asbestos litigation, see Willging, op. cit., pp. 5-16 and 121-22; see also J. S. Kakalik et al., *The Variation in Asbestos Litigation Compensation and Expenses* (Santa Monica, Calif.: Institute for Civil Justice, The Rand Corporation, 1984), pp. vii and 3-4, and Hensler, op. cit., p. 21.

suits,⁴⁸ especially for products whose adverse effects may be neither direct nor immediate. The user may be unaware of the product's role in producing an injury or of the injury itself; only as a result of information about others' litigation efforts may a possible grievance be recognized or reinforced—a critical first step in the filing of a claim.⁴⁹ When exposure to the product is widespread throughout the population, there is greater potential for a large number of claims.

These data do not shed light on the reasons for the 104 percent growth since 1976 in cases unrelated to asbestos, the Dalkon Shield, or bendectin. Some researchers have reasoned, however, that some of that growth may relate to increases in the number of products available and increases in the population.⁵⁰ The real gross national product (GNP) for personal expenditures on durable and nondurable goods, a rough index of the number of products available to consumers, increased 36 percent from 1976 to 1986, with an average annual increase of about 3.6 percent.⁵¹ Since claims often follow several years after product purchase, growth in GNP since 1970 would also be relevant to claims filed in our analysis time period, 1976-86.⁵² From 1970 to 1985, the real GNP for personal expenditures on goods increased 49 percent. From 1976 to 1986, product liability cases unrelated to asbestos, the Dalkon Shield, and bendectin increased more than expenditures on goods; these product liability filings, however, have grown at a slightly lower rate than personal expenditures on goods since 1981, with annual growth rates of 4 percent for product liability filings and 5 percent for personal expenditures on goods.⁵³

⁴⁸In the case of asbestos, uncovering information for early suits was difficult and required substantial investment on the part of plaintiffs' attorneys. See Hensler, *op. cit.*, pp. xxv-vi.

⁴⁹Galanter discusses "mobilization" and "demobilization" effects of litigation in Reading the Landscape of Disputes, *op. cit.*, p. 34.

⁵⁰National Center for State Courts, *op. cit.*

⁵¹Bureau of the Census, Statistical Abstract of the United States, 1987, 107th ed. (Washington, D.C.: U.S. Department of Commerce), p. 417.

⁵²Ninety-three percent of all claims are filed within 5 years of product manufacture. Products manufactured in the 5 years immediately preceding 1976 would, therefore, account for some of the claims filed in 1976-86. See Insurance Services Office, Product Liability Closed Claim Study: A Technical Analysis of Survey Results (Washington, D.C., 1977), p. 77.

⁵³There may be a lag between changes in the GNP and the effects of these changes on product liability filings. We had insufficient data, however, for determining how long the lag might be and, thus, have calculated relative growth rates without a lag.

From 1975 to 1985, the population grew 12 percent.⁵⁴ As a function of the aging of people born in the post-World War II baby boom, the category of those aged 20 to 64 years increased 20 percent.⁵⁵ Because this age group files a disproportionate number of product liability claims (for example, in 1976, the group filed 75 percent of the bodily injury claims, but it was only 55 percent of the population),⁵⁶ we would expect to see the number of product liability suits increase by more than the 12 percent attributable to overall population growth. Since other factors, such as product safety, may have affected the rate of filings over the past 10 years, however, we cannot say with certainty that expansions in the economy and the population account for some of the increases in federal court filings.

These data also tell us nothing about whether particular suits are substantive or frivolous or whether society is excessively litigious. As others have noted, determining whether society is excessively litigious is very complex and would require much more information (for example, on exposure rates) than the number of suits filed. In addition, these data tell us nothing about the extent to which the stated goals of providing equitable outcomes and deterring wrongdoing are fulfilled by the current tort system or would be fulfilled by reforming the current system.

A variety of considerations enter into insurers' decisions as to whether to offer insurance and, if so, at what rates. One of the factors cited by insurers for the rapid escalation in liability rates and the withdrawal of some types of insurance during the mid-1980's was a "litigation explosion," as evidenced by the increase in product liability cases filed in federal courts.⁵⁷ The increase in total filings may have created the perception of a broad litigation explosion, which in and of itself may have influenced insurers' decisions. We found, however, that a significant part of the growth is concentrated in one product, asbestos, and that the growth related to products in general appears to be neither rapidly accelerating nor explosive.

⁵⁴Bureau of the Census, Current Population Estimates of the U.S. by Age, Sex, and Race: 1980-1986 (Washington, D.C.: U.S. Department of Commerce, P-25, no. 1000, Feb. 1987).

⁵⁵Ibid.

⁵⁶Insurance Services Office, op. cit., p. 114.

⁵⁷Insurers contend that increases in award amounts, high litigation costs, and the unpredictability of case outcomes have played major parts in their decisions.

Asbestos-Related Personal Injury Cases Filed in Federal Courts and Product Liability Cases Filed in State Courts: Sources of Data

Asbestos Cases Filed in Federal Courts

The Administrative Office, in November 1984, introduced a separate code for product liability asbestos cases involving personal injury. For the years 1984-86, therefore, we were able to identify most personal injury asbestos cases directly from the Administrative Office's coding of case type. We used FJC's analysis and ACF's claimant information (a list of claimants and lawsuits from 1970 or later compiled from information maintained by ACF's member manufacturers) to identify (1) product liability cases filed before November 1984 that were asbestos-related and (2) any product liability cases filed in 1984-86 that involved asbestos-related personal injury but may have been incorrectly coded as nonasbestos cases in the Administrative Office's data base. With the Administrative Office's assistance, we eliminated any duplicate filings that may have resulted from the transfer of cases between courts (see pp. 12 and 16).

FJC searched the Administrative Office's master tapes for 1978-86 cases that named (1) as the defendant, 1 of 22 companies frequently sued in asbestos-related cases and (2) as the plaintiff, a noncorporate entity (a person rather than business enterprise that would sue for something other than personal injury). The defendants used in the search are

- American Chemical (also referred to as AMCHEM or AMATEX),
- Armstrong World Industries,
- Asbestos du Quebec,
- Bell Asbestos Mines,
- Celotex Corporation,
- Eagle-Picher,
- Fibreboard Corporation (also referred to as U.S. Fiber),
- Flintkote,
- Forty-Eight Insulation, Inc.,
- G.A.F.,
- Johns Manville,
- Keene Corporation,
- National Gypsum Co.,
- Owens Corning,
- Owens-Illinois,
- Pacor (Paycor),
- Pittsburgh Corning,
- H.K. Porter Co. (also referred to as Porter Co.),
- Raymark Asbestos (also known as Rayasbestos/Raymark),
- Standard Insulation (also known as Standard Asbestos),
- UNARCO, and
- U.S. Gypsum.

Appendix I
Asbestos-Related Personal Injury Cases Filed
in Federal Courts and Product Liability Cases
Filed in State Courts: Sources of Data

FJC searched all product liability cases filed in 1978-86. To identify cases filed in 1974-77 that were asbestos-related, we searched product liability filings in those years using FJC's defendant and plaintiff criteria.

We also used ACF's list to identify at least some asbestos cases that may have gone undetected using the FJC criteria or the Administrative Office's coding. We have no information with which to assess the reliability or completeness of either ACF's list or consolidated data base. Since asbestos claims often involve more than one manufacturer, however, merging information from several could have produced duplicate claimants. When merging the information, ACF attempted to eliminate possible duplicates. But according to one of ACF's data base managers, a small number of duplicates probably still remain in the consolidated data. However, our estimates would have been unaffected by duplicates in the ACF list. In comparing individual product liability cases reported by the Administrative Office with cases in the ACF list, once we identified a case in the Administrative Office's data base as asbestos-related, it was eliminated from further consideration.

If a claimant filed a suit, the ACF list includes docket number and filing date for the case. If a claimant filed more than one suit (for example, as would occur when a suit was simultaneously filed in a state court and federal court, or when a suit, initially filed in a state court, was removed and refiled in federal court), there would be information about only one suit. Therefore, the list may be inadequate for getting a complete count of all filings in federal courts not included in the FJC criteria.

We compared the ACF list with product liability suits in the Administrative Office's data base that had not been identified as asbestos-related by either the Administrative Office's original coding or the FJC criteria. A case was counted as asbestos-related if it matched the ACF list for (1) plaintiff's last name, (2) state in which the case was filed, and (3) docket number or filing date or both. Filing dates within 7 days of each other were considered to be a match. A case in the Administrative Office's data base that matched an ACF list on filing date but not docket number was assumed to be a federal case, filed simultaneously in federal and state courts or transferred from state court to federal court (the case in the state court was specified on the ACF list).

We compared the ACF list with all product liability cases in the Administrative Office's data base for 1974-77. Because of resource constraints and the increasing volume of cases for the years 1978-86, we limited our

Appendix I
Asbestos-Related Personal Injury Cases Filed
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search in those years to the District of Columbia and nine states (California, Louisiana, Maine, Massachusetts, Mississippi, New Jersey, Ohio, Pennsylvania, and Texas). These states and the District of Columbia (1) include 22 of the 94 federal districts and the six states with the largest number of claimants and (2) account for 63 percent of the claimants in ACF's data base. In addition to selecting states based on numbers of claimants, we also included a few states for which ACF appears to have retained federal court rather than state court docket numbers in its data base; this maximized the number of cases identified. Since our counts of asbestos-related cases in later years may have been lower than they should be, the possible effect of comprehensively searching only a subset of state cases after 1977 would be to understate the growth in asbestos-related cases.

From examining cases in years 1974-77, we identified a relatively common defendant in asbestos litigation, Combustion Engineering, which had not been included in the FJC analysis. For 1978-86, we searched all state cases for product liability cases against Combustion Engineering and counted them as asbestos-related.

Product Liability Cases Filed in State Courts

Connecticut Filings

We obtained information on the number of product liability filings in state courts from the State Court Administrative Office. The office maintains a centralized data base of all product liability filings in Connecticut's courts that are a consolidation of superior and common pleas courts. The data are limited to 1979 and later because earlier information is incomplete in some years. In addition, a 1978 court reorganization may make post-1978 data noncomparable with earlier information. Finally, as of 1979, Connecticut's fiscal year ended June 30th and, therefore, corresponds to the Administrative Office's statistical year for reporting federal data.

Iowa Filings

Estimates of the number of product liability filings, other than cases related to contractual matters, in 1981, 1983, and 1985 were available from a study of tort litigation in Iowa, sponsored by the National Center

Appendix I
Asbestos-Related Personal Injury Cases Filed
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for State Courts. These estimates were based on a 10-percent sample of all tort filings in the state and are, therefore, subject to some degree of sampling error. Using the sample sizes, we estimate, with 95-percent confidence, that projected filings are within ± 56 cases of the actual number of product liability filings in each year.

Massachusetts Filings

The State Court Administrative Office provided us with the number of product liability filings in all of Massachusetts courts (other than the Supreme Court) for 1984-86. The first year for which Massachusetts compiled these statistics was 1984.

Asbestos Filings

Estimates of the percentage of asbestos cases filed in state courts were obtained from ACF and ICJ. ACF's estimate is an approximation based on the claims experience of its members; ICJ's estimate is based on information reported in the Los Angeles Times and an FJC report on the number of cases filed as of April 15, 1985.¹

Filings Brought Against
National Machine Tool
Builders Association
Members

NMTBA provided us with information on the percentage of claims filed against its members in state courts and federal courts for calendar years 1984-86. Since 1976, the association has conducted an annual product liability survey of its membership. Since 1985, the members have been asked to report the number of claims filed against them in federal courts and state courts in the preceding calendar year. On the average, about one-third of the membership responds each year. We obtained information only on percentages rather than numbers of filings because the percentages were readily available from the association's report of survey findings.

¹Hensler, op. cit., p. 21.

Comments From the Department of Justice and GAO's Reply



U.S. Department of Justice

Washington, D.C. 20530

November 16, 1987

William J. Anderson
Assistant Comptroller General
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for providing us with a draft copy of GAO's upcoming report entitled "Product Liability: Nature and Extent of Growth in Federal Tort Filings" (HRD-87-132BR). We have reviewed the draft, and our detailed comments are contained below. As an initial matter, however, we must disagree with the draft report's implicit fundamental premise -- that caseload filing data concerning asbestos and Dalkon Shield cases simply can be ignored when determining whether there has been substantial growth in federal product liability cases and whether that growth is evidence of an increasingly litigious society.

When the Administration's Tort Policy Working Group issued its initial report on the crisis in the availability and affordability of liability insurance, it found that "there has been a substantial increase in recent years in both the number of tort lawsuits and awarded damages."¹ With respect to tort filings, this conclusion was based upon the best available data, which were acknowledged as having limitations.² Nevertheless, the Working Group cited a documented increase in product liability filings in federal court as one of six indicia corroborating this conclusion.³ It saw no need to dissect the federal filing data.

¹ Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (hereinafter Report of the Working Group), at 45 (February, 1986).

² Id.

³ For example, the Working Group also cited coordinate increases in medical malpractice claims and cases filed, as well as increases in municipal liability claims. Id. at 45-47.

**Appendix II
Comments From the Department of Justice
and GAO's Reply**

GAO'S REPLY

The report does not ignore asbestos and Dalkon Shield cases (or bendectin cases for which data not previously available were added after our draft report was sent to Justice). We show product liability cases both with and without these products. The Working Group's 1987 report also analyzed the growth in federal filings with and without asbestos-related filings.

Our report does not deal with overall increases in tort lawsuits. Rather, our primary objective was to determine whether certain specific products, such as asbestos, contributed significantly to the increase in product liability cases. To achieve this objective, we did see the "need to dissect the federal filing data."

JUSTICE'S COMMENTS

The Working Group was well aware that a significant number of the product liability cases filed in federal court since 1984 involved asbestos-containing products. This plainly was not considered an aberration in the data. To the contrary, it was perceived as merely the most pervasive example of a rapidly evolving variant of traditional product liability jurisprudence -- toxic tort litigation. In many ways, recent developments in toxic tort litigation present a microcosm of the problem areas in tort law which the Working Group recommended for reform.⁴ As a result, not only was the elimination of asbestos cases considered unnecessary, to have done so would have been to mask a particularly important trend in the expansion of tort litigation.

The Working Group does not expect asbestos cases to abate in the foreseeable future.⁵ Moreover, asbestos cases are certain to be augmented by toxic tort cases involving any number of other substances. Many of these are likely to be workplace related, brought by persons trying to circumvent the workers' compensation system.⁶ Similarly, the Dalkon Shield cases are not unique. Product liability cases involving pharmaceuticals and medical devices have become routine. The draft report cites several examples (Bendectin, DES, etc.) which, instead of being dismissed as uncommon, are representative of a growing trend. In the absence of civil justice reform, other similar products can be expected to be litigation targets in equal or higher numbers.

The above is not meant to suggest that manufacturers of a particular substance or product should or should not be subject to toxic tort or product liability. But to ignore these cases as somehow irrelevant to the growth trend in product liability litigation is to miss the forest for the trees. The growth in mass product liability litigation is an integral part of the overall litigation.

⁴ For example, novel theories of liability and abuses in the award of punitive damages are not uncommon in toxic tort litigation.

⁵ According to a May 25, 1987 article in Business Insurance, the Asbestos Claims Facility was then receiving new asbestos-related claims at the rate of 2,100 per month.

⁶ See, e.g., Moss, Toxic Tort Cases Mounting, ABA J., Oct. 1, 1987, at 30. We expect this phenomenon will be particularly evident if Congress enacts the worker notification legislation (H.R. 162 and S. 79) currently under active consideration.

Appendix II
Comments From the Department of Justice
and GAO's Reply

GAO'S REPLY

Concerning asbestos, a recent FJC report maintains that the confluence of factors producing the "explosion" in asbestos litigation is unique.¹ The report concludes that an explosion associated with another product, although possible, is improbable in the near future.

We do not know whether there will be another product that will be the subject of as many product liability cases as asbestos. Asbestos cases have gone from about 1 percent of federal product liability filings in 1976 to about 44 percent in 1986. Asbestos case growth is not typical of product liability case growth; we believe, therefore, that an examination of product liability case growth both with and without asbestos cases is appropriate.

The trends for the Dalkon Shield and bendectin may be representative of trends for like products (medical devices and pharmaceuticals), as the Justice Department has argued. Many of the products that have been cited as contributing substantially to the growth in product liability filings are, like bendectin, pharmaceuticals (see p. 15). The question remains, however, as to whether the growth in cases related to pharmaceuticals and medical devices is typical of products in general. These questions may only be answered with time and, to fully address, would require examining cases related to more products than we were able to examine. The Dalkon Shield and bendectin alone, however, account for 6 percent of the growth in nonasbestos cases from 1976 through 1986 and 37 percent of that growth from 1976 to 1985, the last year examined by the Working Group. Given the large number of products in our society, it seems unreasonable to assume that two products accounting for so much growth are typical of what has occurred and could be expected to occur with products in general.

¹T. Willging, Trends in Asbestos Litigation (Washington, D.C.: Federal Judicial Center, 1987), pp. 5-16 and 121-22.

JUSTICE'S COMMENTS

Having made this fundamental objection to the draft report's premise, we also wish to take issue with several of the methodological choices made by the report's authors in their evaluation of federal product liability caseload growth. First, despite the report's agreement that "multiple counts" had no significant impact upon the federal filing data for trend purposes, it has chosen to delete significant numbers of cases from the federal data as duplicates. We are concerned that these deletions may well distort the raw numbers upon which the report's conclusions are based.

For example, the draft report deletes as a multiple count any product liability filing which is not an original filing or a removal from a state court.⁷ It is unclear from the report, however, whether asbestos case transfers were similarly taken into account in determining the number of asbestos case filings. It is equally unclear whether asbestos cases are more likely to be transferred than cases involving other types of products. If, as we suspect, such is the case, and unless this phenomenon has been taken into account in the report's calculation of deletable asbestos cases,⁸ this could markedly affect the validity of such subsequent deletions. The report may well unknowingly be deleting too many asbestos cases.

⁷ As an aside, the report is unclear as to how its authors have been able to determine which product liability filings during the period 1974-86 are transfers, reopens, remands, etc., and thus, under its methodology, duplicates. It cites the Administrative Office of the U.S. Courts as the source of these data, but such data are not contained in any of their published reports which we have seen. If there are previously unpublished data, we believe the draft report should so indicate.

⁸ Which, apparently, has not been done.

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Because the report's analysis of total growth is partially based on its rejection of asbestos cases, we suggest that it would be statistically safer simply to ignore the red herring of "multiple counts." The alternative -- doing a more exhaustive and detailed analysis of the nature of the multiple count problem, particularly with regard to asbestos cases -- necessarily would entail a great deal of time and effort. We also are uncomfortable with the numbers used by the report's authors in deducting asbestos and Dalkon Shield cases from the "non-multiple count" base figures. Our principal concern is that Appendix I provides the reader with insufficient information to evaluate the credibility of the report's conclusions concerning, for example, the number of asbestos cases filed in federal court between 1984-86. For that time frame, the report asserts that there were 369 more asbestos cases filed in federal court than are accounted for in the Administrative Office of the U.S. Courts data. Assuming this to be true, were these cases also "missed" by the Administrative Office as "product liability" suits?

Like most of the report's likely readers, we are unfamiliar with the database maintained at the Asbestos Claims Facility. At a minimum, a more detailed description of how this database was compiled and maintained would be desirable, since the database must have been put together largely by the asbestos industry well after the fact. This is particularly troublesome for the pre-1984 data, for which there is no standard of comparison. Were any of the pre-1984 cases actually examined to ensure that they were, in fact, personal injury product liability lawsuits? We also are curious, but uninformed by Appendix I, as to the Administrative Office's reaction to the draft report's figures. Have they accepted them, explained the discrepancies, or even been apprised of the report's conclusions?

We are not asserting that the asbestos figures used in the report necessarily are unreliable. However, an asbestos case should be particularly easy to identify and code. As a result, a 3 percent "miss" rate by the Administrative Office between 1984-86 strikes us as unusual. A more thorough explanation certainly is in order. As for the Dalkon Shield cases, we have already explained that we do not consider these cases to be sui generis. Certainly, their deletion is even far less justified than the deletion of the asbestos cases.

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Our report shows federal filing statistics both with and without duplicates. We have clarified our findings to show that asbestos case transfers were taken into account. In addition, Administrative Office officials told us that asbestos cases are rarely transferred between courts.

Excluding duplicates, the Administrative Office reported 2,690 asbestos-related cases in 1984; 4,138 cases in 1985; and 5,304 in 1986, as compared with our estimates of 2,922 cases in 1984; 4,389 cases in 1985; and 5,627 cases in 1986. Possible reasons given by the Administrative Office for why our estimates are higher include (1) there may have been a time lag in attorneys' obtaining forms with the new asbestos code (because attorneys often keep a supply of forms in their offices and fill them out there) and (2) it may have taken time for attorneys to become familiar with the new code. Since our analyses were limited to personal injury product liability cases, our estimate did not include asbestos cases that were not coded as product liability cases.

In appendix I, we have added information on the ACF data base.

JUSTICE'S COMMENTS

Another major decision made by the authors of the report concerns the 1974-75 filing data. The report ignores these data, raising the base year to 1976, purportedly because the authors believed that the earlier filing data could not be compared to subsequent data. Of course, by raising the baseline filing level, subsequent year percentage growth declines. The question, then, is whether there is adequate reason to raise the baseline by almost 2,000 cases. Essentially, the report asserts that a new coding procedure and a high level of growth between 1974-76 justifies the conclusion that the data are inaccurate and should be ignored. But the analysis in this regard is highly conclusory and unpersuasive.

The new procedure implemented by the Administrative Office of the U.S. Courts hardly was substantial. The Administrative Office simply added an additional code, for product liability cases, to a system which already used codes extensively. It also delegated to the individual courts certain coding responsibilities that theretofore were performed at the headquarters. The draft report acknowledges that there is no way of knowing what, if any, effects these "changes" may have had on the filing data. Nevertheless, it presumes that the changes resulted in undercounting actual pre-1976 product liability filings. The report suggests that cases may be undercounted because counters needed time to become accustomed to the new code. But, it is equally likely, and equally speculative, that counters would have been particularly sensitive to a new code and their new responsibilities, and that they would carefully evaluate cases to see if they qualified.

The attempt by the authors of the report to substantiate this conclusion with an analogy to the introduction of the asbestos code in 1984 simply does not withstand scrutiny. Apparently based upon their independent calculation of asbestos cases between 1984 and 1986, the authors opine that undercounting by the Administrative Office occurred during the first three years the asbestos code was implemented. First, as indicated above, identifying and coding an asbestos case would seem to be a fairly straightforward task. Certainly, one would expect that by 1984, ten years into product liability coding, it would take little time to become accustomed to separately coding asbestos cases. But the alleged "undercount" in asbestos cases between 1984-86 was consistently between 110 and 130 cases. If these undercounts really exist, and if they largely were due to the use of a new code, one would have expected a marked decline in these numbers from 1984 to 1986. Again, we would be particularly interested in the Administrative Office's reaction or explanation to the allegations that its 1974-75 data are inaccurate.

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Nor do we agree that the growth rate during 1974-76 was so large -- 115% -- that, ipso facto, it constitutes evidence that the figures are unreliable. While the percentage growth over those two years was large, such raw number growth was not "exceptional" when compared with other years. Using the report's figures for non-asbestos, non-Dalkon Shield growth, there are several other periods where the absolute increase in case filings (regardless of percentage) was also quite large.⁹ The report's focus only on year-to-year percentage growth is somewhat misleading, because the large growth in 1974-1976 coincided with the use of those years as the baseline for total 1974-86 growth. Obviously, an equivalently large raw number growth in subsequent years can be equally probative, even though it will constitute a smaller percentage growth over the previous year.

Also, when the federal product liability filings are broken down by type, the apparent early year "discrepancies" blur even further. A rise in miscellaneous personal injury product liability filings may well present the best short-term picture of society's tendency toward litigiousness. But, according to the Administrative Office, such filings in federal court (those not including Marine, Airplane, Motor Vehicle, Asbestos or Dalkon Shield cases), rose from 918 in 1974 to 4700 in 1986, an increase of 412%. The largest raw number increases actually came between 1984-85 (615) and 1980-81 (761). 1974-75 and 1975-76 were only in third and fifth place (532 and 472, respectively). 1978-79 was fourth with 500. In fact, 1974-76 was not even the highest two-year period (at 1004) -- 1979-81 was higher (at 1140).

In sum, we are completely unpersuaded that the data from 1974-76 should simply be ignored. The draft report provides no reason for ignoring those data which withstand careful analysis. Unfortunately, by ignoring data from those years, the report drastically deemphasizes the total percentage filing growth -- a fact that undoubtedly will not escape substantial criticism given the suspect justification for ignoring those years. We would suggest that, instead of being inaccurate or unreliable data, 1974-76, like 1979-1981,¹⁰ was simply a period of very rapid growth in product liability lawsuits.

⁹ For example, the increase from 1974 to 1975 was 1030 cases, and from 1975 to 1976 it was 703 cases. But from 1978 to 1979 it was 660 cases, and from 1980 to 1981 it was 824 cases. Thus, the growth from 1974 to 1976 does not appear to be at all aberrational.

¹⁰ Which the report's authors have not attempted to explain away.

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We believe that changes in data collection in 1974-75 were sufficient to question the data from that period. Both the data coding scheme and the coders were changed during that period. Further, the conclusion that there was some degree of coding error in those years is supported by trends in both (1) liability filings and (2) filings for personal injury in general (pre-1974 product liability personal injury cases were coded in this category).

If product liability cases were miscoded initially and more accurately reported over time, categories in which these cases were coded before 1974 are likely to show a decrease, not only in the first year they were coded separately but also in later years. As product liability cases are more accurately classified, more and more cases would be eliminated from the pre-1974 categories in which they had been coded. Before 1974, product liability personal injury cases were coded as general personal injury cases. The reported number of personal injury cases declined from 1973 to 1974, as would be expected in the first year product liability cases were separately coded. Consistent with our hypothesis that product liability cases were underreported in the first years of the coding category, the number of personal injury cases also decreased in 1975 and 1976. In 1977, these cases started an upward trend that has continued in each year through 1986. This, coupled with the Administrative Office's report of the recent experience of miscoding when a new asbestos case code was introduced, reinforced our concerns about the reliability of these data. Had all of these factors not converged, we would have been less likely to conclude that the data from 1974-75 may be inaccurate. In addition, when asked to comment on our analysis, the Administrative Office agreed that the 1974-75 procedural changes were significant and constitute

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good reasons for suspecting that the data are incomplete. We also note that tables 1-4 report product liability filings data starting with 1974.

The Justice Department argues that the growth in filings from 1974 to 1976 is not exceptional when the growth in numbers of cases is considered. We believe that considering only numbers of cases is misleading; for the most part, the significance of the growth in one year in the numbers of cases is determined by the percentage increase from preceding years. The meaning of an increase in 1,500 cases with a baseline of 1,500 is very different from the same increase with a baseline of 8,000 cases.

In addition, there is no evidence that 1974 (the first year in which the Administrative Office compiled product liability statistics) was a representative year for measuring change or that a 10-year period (1976-86) does not provide sufficient trend data.

JUSTICE'S COMMENTS

The report's attempt to compare federal and state growth in product liability filings is interesting, but of little extrinsic value in the debate over nationwide growth in product liability lawsuits. The report's study of the Dalkon Shield cases shows a total of 6,753 filings in state court between 1974 and 1986, while 4,952 cases were filed in federal court over the same time frame. The report then looks at percent growth, again ignoring 1974-1975 (for no apparent reason), and notes growth of 42% at the state level but 226% at the federal level. Supposedly, this demonstrates that, in general, state product liability filing growth has been slower than federal growth. It also is said to show an increased propensity to litigate in federal court.

But this is all extremely suspect. Percentage growth is very misleading when just looking at Dalkon Shield cases for a host of product-specific reasons. Most obvious is the tremendous influx of cases filed both for and during 1985 in response to the announcement of an impending claim cut-off; which was then, of course, followed by a big drop-off in 1986. Had 1985 been used as the end year -- which would have led to an equally misleading conclusion -- the percentage growth figures would have been markedly different. For the same product-specific reasons, we would caution extreme hesitation before using the Dalkon Shield cases as support for any conclusions about the public's general propensity to sue in federal court.

Equally suspect is the report's examination of Connecticut and Iowa data. The Connecticut data may be accurate, but they are hardly probative. They show an absolute increase of state court filings in product liability cases from 320 in 1979 to 501 last year, a 57% increase. During the same time, federal product liability filings in Connecticut's district courts rose from 89 to 374, an increase of 320% -- almost six times the state court growth rate. But the numbers here are far too small to give the percentage differences any real significance. Also, the patterns of growth are markedly different. With the exception of 1980-1981 (when filings decreased 1%), state court product liability filings in Connecticut grew steadily between 6% and 9% a year between 1979 and 1986. Federal filings, on the other hand, were on a roller coaster. Some years saw huge increases; other years saw large drops. Whatever the explanation, and we offer none, these data are of marginal value at best.

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Concerning the Dalkon Shield, we chose 1976 as the baseline year to make the time period comparable with our analysis of product liability filings in federal courts. We changed it to 1974 in the report to cover the entire time period considered in the Working Group's report. As the Justice Department pointed out, the percentage growth in both state courts and federal courts varies markedly depending on the baseline year and the end year. Regardless of whether the baseline year is 1974 or 1976 or whether the end year is 1985 or 1986, however, the growth in product liability cases in federal courts is larger than the growth in state courts. Using 1985 as the end year, the percentage growth in federal filings is two to four times the growth in state filings, down from approximately five times the growth in state filings when 1986 is the end year. Relative growth in federal courts and state courts is approximately the same regardless of whether the baseline year is 1974, 1975, or 1976. In addition, the percentage of Dalkon Shield cases filed in federal courts was 44 percent in 1983; 47 percent in 1984; and 48 percent in 1985; therefore, the pattern of increasing proportions of federal filings holds in the earlier years as well as in 1986. Partly in response to the Justice Department's comments and because growth varies depending on the baseline and end years, we have focused our analysis of the state data on patterns of growth within the time periods for which we have data rather than on percentage changes between specific baseline and end years.

Although the relatively small numbers of cases in Connecticut and Iowa may make percentage differences insignificant in some contexts (for example, in their impacts on insurers), we believe the numbers of cases are sufficient to question whether filings in state courts have grown at the same rate as filings in federal courts--an assumption for which the Working Group presented no evidence.

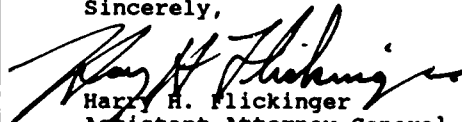
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In sum, the draft report has made some hasty, inadequately explained, and in some cases unjustified choices in interpreting the federal caseload filing data for product liability lawsuits. Perhaps a more careful and time-consuming analysis of the federal data would show a lesser percentage growth than is presented by the unanalyzed Administrative Office data. We recognize that the growth rate of 758% cited by the Working Group is so extraordinarily high that the natural inclination of the report's authors may have been to try to develop explanations for this figure other than that the increase reflects society's growing litigiousness. Nevertheless, for the report's analysis to serve as a more reliable indicator of litigation growth, any attempt to reduce or explain that rate should be the product of a more careful, thorough and well-documented analysis. In its present form, we are not convinced that the draft report presents such an analysis. At a minimum, the report's conclusions should be tempered by the very real limitations presented by certain of its methodological choices.

Despite our disagreement with some of the report's methods, and our fundamental opposition to ignoring the phenomenon of mass product liability litigation, we very much appreciate having been given the opportunity to review and provide comments on this draft. Thank you for that consideration.

Sincerely,


Harry H. Flickinger
Assistant Attorney General
for Administration

GAO'S REPLY

The purpose of our review was to examine the nature and extent of the growth in liability filings--not to disprove the theory that society has become more litigious. In response to specific questions or issues raised in Justice's comments, we have added some data to this report; in part as a response to Justice's comments, we have refrained from drawing conclusions about litigiousness. We believe this report adequately explains our interpretation of the data. Further, we believe our conclusions are adequately supported by the evidence.

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U.S. GAO, 1988, 1-14-88, 1-14-88

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